In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1428

TED BUTLER AND EMIL PETERS,
Petitioners,

vs.

RICHARD C. DEXTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KEITH W. BURRIS
Assistant Criminal District Attorney
District Attorney's Office
Bexar County Courthouse
San Antonio, Texas 78205

ALAN E. BATTAGLIA
Assistant Criminal District Attorney

DOUGLAS C. YOUNG
Assistant Criminal District Attorney
Attorneys for Petitioner Ted Butler

JANE HAUN MACON
City Attorney for San Antonio, Texas
City Hall
San Antonio, Texas 78205

STEVEN ARRONGE
Assistant City Attorney for San Antonio, Texas
Attorneys for Petitioner Emil Peters

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above action entered on January 19, 1979, affirming the judgment of the United States District Court for the Southern District of Texas and remanding the cause to the United States District Court for an award of attorney's fees against Petitioners.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 559 F.2d 1286 (Part I and III only). It is attached as Appendix A to this petition at page A1. The decision of the United States Court of Appeals on Rehearing En Banc is reported at 587 F.2d 176 and the attorney's fees issue is incorporated at 587 F.2d 159 (Part IV only) and is attached as Appendix B and C at pages A39 and A41. The order denying Petitioners' Sec-

ond Petition for Rehearing is attached as Appendix E at page A135. The opinion of the United States District Court for the Southern District of Texas is reported at 404 F. Supp. 33 and is attached as Appendix D at page A80.

Because the opinion of the District Court was by a three-judge panel under Title 28 U.S.C. §2281, direct appeal was taken to the United States Supreme Court. The opinion on appeal is reported at 425 U.S. 262, 96 S.Ct. 1527, 47 L.Ed.2d 774 and is attached as Appendix F at page A137.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 19, 1979, after the court's opinion on rehearing en banc was rendered December 18, 1978 and a Second Petition for rehearing was denied by the Fifth Circuit on January 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, in light of *Hicks* v. *Miranda*, "bad faith" may be imputed to a District Attorney and Chief of Police because members of their staff made arrests and filed felony charges of possession of a criminal instrument (i.e. a projector with obscene film attached) against a theater operator after a magistrate had held an adversary hearing and ordered the arrest of the operator on those charges.

2. Whether prosecutorial immunity under *Imbler* v. *Pachtman* precludes an award of attorney's fees against a District Attorney for actions taken within the scope of his prosecutorial duties.

3. Whether a District Attorney and Police Chief are vicariously liable for attorney's fees under Title 42 U.S.C. §1988 of the Civil Rights Act.

STATUTORY PROVISIONS INVOLVED

Tex. Penal Code Annotated (1974), prior to amendment:

§16.01 Unlawful Use of Criminal Instrument.

(a) A person commits an offense if:

(1) he possesses a criminal instrument with intent to use it in the commission of an offense; or

(2) with knowledge of its character and with intent to use or aid or permit another to use in the commission of an offense, he manufactures, adapts, sells, installs, or sets up a criminal instrument.

(b) For purposes of this section, "criminal instrument" means anything that is specially designed, made, or adapted for the commission of an offense.

(c) An offense under this section is a felony of the third degree.[1]

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1. The statute was amended in 1975 to read as follows:

"Section 16.01. Unlawful Use of Criminal Instrument

"(a) A person commits an offense if:

"(1) he possesses a criminal instrument with intent to use it in the commission of an offense; or

"(2) with knowledge of its character and with intent to use or aid or permit another to use in the commission of an offense, he manufactures, adapts, sells, installs, or sets up a criminal instrument.

(*Continued on following page*)

United States Code, Title 42:

§ 1988. Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue

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Footnote continued—

"(b) For the purpose of this section, 'criminal instrument' means anything, the possession, manufacture, or sale of which is not otherwise an offense, that is specially designed, made, or adapted for use in the commission of an offense.

"(c) An offense under Subsection(a)(1) of this section is one category lower than the offense intended. An offense under Subsection (a)(2) of this section is a felony of the third degree." Tex.-Laws 1975, ch. 342, §7, at 913. Section 16.01 (as amended 1975)

Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Petitioner, Ted Butler, was the Criminal District Attorney of Bexar County, Texas[2] at the time this action arose and Petitioner, Emil Peters, is the Chief of the San Antonio Police Department. Respondent, Richard C. Dexter, was the employee and manager of an "adult" motion picture theater in San Antonio known as the Fiesta Theater, and during the months of June through October of 1974, Respondent commercially exhibited at the Fiesta Theater a film advertised locally as "XXX Deep Throat."

This is a case involving four separate seizures of the film "Deep Throat", and the arrest of Respondent for possession of a criminal instrument, a felony offense. On four separate occasions, June 24, 1974, June 28, 1974, July 2, 1974, and July 6, 1974, an officer of the San Antonio Police Department paid for admission, entered the Fiesta theater and viewed the film. On each occasion, the officer returned to the police station to type up a report and sign a "Motion for Adversary Hearing" to determine whether there was probable cause to seize the film for violating the Texas obscenity law. The police officer then presented the motion to a magistrate, along with a copy of his police report describing the film he viewed, and on

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2. Petitioner Ted Butler is no longer the District Attorney of Bexar County, Texas. Bill M. White became District Attorney by appointment on April 1, 1976, when Petitioner, Butler, assumed the bench of the 226th Judicial District Court of Bexar County, Texas.

each occasion a magistrate entered an order setting the matter for hearing at the theater.[3] Respondent was served by a police officer with written notice of the magistrate's order and advised to notify his attorney to appear at the hearing. The magistrate appeared in the lobby of the theater approximately one hour later to conduct the hearing.[4] Having already spoken to his attorney by phone, Respondent waived appearance of counsel on his attorney's advice and declined the offer made by the magistrate to appoint him an attorney. An Assistant District Attorney attended the hearing and questioned the police officer after the officer was sworn by the court reporter. On each occasion the magistrate heard the police officer's testimony and then viewed the film. After each hearing the magistrate issued a warrant to arrest the theater operator and to seize the projector and attached film as a criminal instrument under §16.01 of the Texas Penal Code. The magistrate ordered the Respondent arrested for the misdemeanor offense of commercial obscenity in violation of §43.23 Texas Penal Code and the felony offense of possession of a criminal instrument in violation of §16.01 Texas Penal Code.[5] Pursuant to the magistrate's order of ar-

3. The magistrates conducting the adversary hearings and ordering the arrests and seizures were Judge Fred Clark, Judge J. P. Gutierrez, and County Judge Blair Reeves.

4. The magistrates of Bexar County instituted the practice of holding adversary hearings at the theater proper because in the past when notices were served upon theater operators that an adversary hearing was to be conducted by the magistrate on a specified date in court for the purpose of viewing the film alleged to be obscene, theater operators, in order to prevent the magistrate from viewing the film, would immediately ship the film outside the court's jurisdiction or would appear with a substituted film wholly different from the film which was shown at the theater and which was the subject of the hearing.

5. On three of the occasions Respondent was arrested, and on another occasion William Walker, a theater employee, was arrested.

rests, a member of the Criminal District Attorney's Office prepared and filed felony complaints against Respondent for the offense of possession of a criminal instrument. On July 3, 1974, Respondent filed a petition for habeas corpus in state court challenging his arrests under the Criminal Instruments Statute. The matter was set for hearing on July 26, 1974, however, the State district judge was unable to conduct the hearing because Respondent, Dexter, and his attorney failed to appear.[6] Before the cases could be presented for grand jury consideration, Respondent, on July 12, 1974, filed suit in federal court under Title 42 U.S.C. §1983 challenging the constitutionality of the criminal instruments statute and seeking an injunction against Petitioners from further prosecution under §16.01. Respondent also moved for a convention of a three-judge District Court under Title 28 U.S.C. §2281.

Although the action was originally filed in the United States District Court for the Western District of Texas, without notification to Petitioners the case was later transferred to the Southern District of Texas to be consolidated with fifteen other obscenity related cases from across the State of Texas then being considered by a three-judge District Court. The managing judge of the three-judge District Court for the Souther District of Texas entered, ex parte and without notice to Petitioner, a temporary restraining order (hereinafter referred to as TRO) against Petitioners.[7] This temporary restraining order was successively extended in 10 day intervals for 339 days despite Petitioners' repeated motions for dissolution and for an immediate evidentiary hearing on the abstention issue

6. See Appendix G at pages A144-A148.

7. The magistrates who had ordered the arrests and seizures under the Texas Criminal Instruments statute were not sued.

raised by *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).[8]

The managing judge of the three-judge court conducted a conference of counsel on August 12, 1974, at which time he indicated that in his opinion the Texas Criminal Instruments statute was vague and overbroad and that he was prepared to give an immediate ruling on the constitutionality of the statute. Again at a hearing on November 15, 1974, the managing judge declared that the statute was facially unconstitutional.

On July 3, 1975, almost one year after suit was brought and the first TRO entered, the three-judge court ruled that the Criminal Instruments statute was constitutional but that it had been applied in a manifestly inappropriate manner; the court thereby ruled the confiscation of the theater's projector and Respondent's arrest for possession of a criminal instrument constituted bad-faith harassment because a film projector was clearly not a criminal instrument under §16.01, Texas Penal Code. The court found further bad faith in the repeated seizures of the film by the police officers and the District Attorney's failure to indict. The district court enjoined all felony prosecutions against Respondent.[9] Because the ruling had been by a three-judge court under 28 U.S.C. §2281 simultaneous appeals were taken to the Fifth Circuit Court of Appeals and to the United States Supreme Court. The Supreme Court, concluding that the case had not warranted a three-judge panel because no substantial issue on the constitutionality of any statute had been in question, vacated the

8. Judge Singleton, the managing judge, declared he would continue to grant successive ten-day TROs ex parte because he felt mandamus would not lie against him so long as he issued TROs rather than a temporary injunction.

9. *Universal Amusement Co., Inc.* v. *Vance*, 404 F.Supp. 33 (1975).

lower court's judgment, allowing entry of a new decree and perfection of an appeal to the Court of Appeals.[10]

On appeal to the Fifth Circuit Court of Appeals, the district court's finding of bad faith was affirmed. The Court went on to conclude that attorney's fees should be recovered against Petitioners though the issue had not been raised until after appeal had been taken.[11] On Rehearing En Banc, the Court of Appeals again affirmed the finding of bad faith and remanded the case for a determination on the amount of attorney's fees to be awarded against Petitioners.[12] Petitioners' second petition for rehearing was denied by the Court of Appeals on January 19, 1979, and judgment was entered on that date. The Fifth Circuit Court granted a Stay of Mandate to March 16, 1979, so that Petitioners could apply to this Court for issuance of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's Finding of Bad Faith, Harassment Against a District Attorney and Chief of Police, Whose Staffs' Actions Were Based on Judicial Authorization, Conflicts With Decisions of the Supreme Court.

The Fifth Circuit's opinion in this case destroys any reliance that a prosecutor or police officer may have upon judicial authority and imposes upon both the prosecutors

10. *Butler* v. *Dexter*, 425 U.S. 262, 96 S.Ct. 1527, 47 L.Ed.2d 774 (1976).

11. *Universal Amusement Co., Inc.* v. *Vance*, 559 F.2d 1286 (5th Cir. 1977).

12. *Universal Amusement, Inc. et al.* v. *Vance, Dexter* v. *Butler et al.*, 587 F.2d 176 (5th Cir. 1978), and partially incorporated at 587 F.2d 159.

and the police officers the requirement that they *correctly* foretell future statutory construction by appellate courts. The decision appears to be in direct conflict with this Court's decision in *Hicks* v. *Miranda,* 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 233 (1976).

A. Bad Faith Cannot Be Inferred From Possible Erroneous Application of a Judicially Uninterpreted Statute.

The lower court concluded that Petitioners had exercised bad faith by charging Respondent, Dexter, with multiple violations of §16.01, Vernon's Tex. P.C., "a statute which [was] manifestly inappropriate to the situation." 404 F.Supp. 50.

It was the opinion of the state court magistrates and also of Petitioners' Assistants that the projectors which had been set up on an elevated platform within the theater and with reels of obscene motion picture film attached were criminal "instruments being possessed for the purpose of commercial exhibition or sale in violation of Chapter 43, Subchapter B, Sec. 43.23 of the Penal Code of the State of Texas."[13] Each projector prior to its seizure was specially set up and adapted for the commercial exhibition of the film "Deep Throat" which the magistrate on each occasion viewed and found to be obscene. As the facts here demonstrate, a projector with an attached reel of obscene motion picture film possessed for commercial use in a public theater can have no legitimate use.

The Texas Criminal Instruments Statute had been law for less than seven months prior to Dexter's initial arrest and had not been interpreted, either judicially or otherwise; therefore, Petitioners had no reason to believe that it did not include a projector and an attached reel of obscene film set up for operation in a public theater. Both the District Court and the Fifth Circuit chastised Petitioner for failing to follow the "Practice Commentary" to §16.01 in the bound volumes of the 1974 Texas Penal Code published by West Publishing Company. At the time of Dexter's arrests, however, West Publishing Company had not yet distributed its bound volumes of the Penal Code containing the "Practice Commentary," which does not even have the force of law. It is grossly unfair to conclude that the magistrates, police officers, and assistant district attorneys should have been guided by a non-judicial interpretation of the statute that only became available to them after these arrests and seizures. The magistrates and Petitioners should not be forced to be seers of future editorial comments published by West Publishing Company.

The interpretation of §16.01 in *Fronatt* v. *State,*[14] noted by the Fifth Circuit, was delivered 17 months subsequent to the arrests and seizures in this case. While it may now be clear under the present state of the law that the Criminal Instruments Statute is inapplicable to a projector and reel of obscene material possessed for purposes of commercial exhibition, Petitioners' actions should be judged by the state of the law at the time of the filing of charges ordered by the magistrates.[15]

In addition, Dexter and his attorney did not contest the applicability of §16.01 to a projector and reel of obscene film or his arrest under the statute when they were afforded every opportunity to do so at the adversary hear-

13. Language taken from the magistrate's warrants to seize and arrest under §16.01 of Texas Criminal Instruments statute.

14. 543 S.W.2d 140 (Tex. Crim. App. 1976).

15. Note: The Texas Legislature changed the language of the statute in 1975.

ings before the magistrates. At each adversary hearing Dexter refused to participate on the advice of counsel. Having failed to challenge the interpretation given to §16.-01 by the magistrates, Dexter cannot now assert that the interpretation at the time was erroneous.[16] Even if the magistrates and Petitioners' subordinates may have applied the statute erroneously, the mere possiblity of erroneous application of a statute is insufficient to justify federal interference in a lawful state criminal proceeding.[17]

In *Sims* v. *Dial*,[18] the court in exercising proper federal court restraint under *Younger* addressed the issue of possible erroneous application of a state statute by recognizing that:

> "To adopt plaintiffs' novel proposition of law, namely, that illegal action on the part of state officials establishes bad faith as a matter of law, would be to resurrect the legal theory that prosecutions brought under a statute, unconstitutional on its face, may be enjoined by a federal court, irrespective of the motives of those who are attempting to enforce it. This proposition was laid to rest by Younger v. Harris, supra. *To hold that a good faith, but erroneous and unconstitutional application of a valid statute is sufficient to justify federal equitable relief would be to hold that a good faith application of an unconstitutional statute justifies federal equitable intervention.* Under the holding in Younger v. Harris, unconstitutionality, in most instances, is not in itself sufficient to justify injunctive relief." (Emphasis added)

16. *Juidice* v. *Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977).

17. *Cameron* v. *Johnson*, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968).

18. 350 F.Supp. 747, 750 (W.D. Tex. 1972).

In this case, the District Court disagreed with the interpretation placed on §16.01 by the State magistrates at a time when the statute had not undergone scrutiny by the Texas Appellate Courts. The District Court arrived at its finding of bad faith in order to overcome the *Younger* doctrine by concluding that the statute had been applied unconstitutionally and to apply a statute unconstitutionally is bad faith. In *Hicks* v. *Miranda*,[19] this Court rejected such a circuitous approach, stating:

> "[E]ven assuming that the District Court was correct in its conclusion, the [California obscenity] statute had not been so condemned in November, 1973, and the District Court was not entitled to infer official bad faith merely because it—the District Court—disagreed with California v. Enskat. Otherwise, bad faith and harassment would be present in every case in which a state statute is ruled unconstitutional, and the rule of Younger v. Harris would be swallowed up by its exception. The District Court should have dismissed the complaint before it. . . ."[20]

B. The Seizures and Arrests Were Judicially Authorized.

As shown by the stipulated facts in the District Court's pre-trial order, seizures and arrests were made on four different dates after a neutral magistrate had conducted an adversary hearing on each occasion. Each time a magistrate viewed the film "Deep Throat", heard testimony, found it obscene, and then ordered seizures and arrests for commercial obscenity and possession of a criminal instrument. Felony complaints for possession of a criminal instrument were filed by an Assistant Criminal District Attorney pur-

19. 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 233 (1976).

20. Id. at 95 S.Ct. 2293.

suant to the judicial orders of arrest. The Assistant District Attorney's actions in filing felony complaints for possession of a criminal instrument on each occasion were based on a good faith reliance upon the judicial authorization received from the magistrate.

The procedures followed by the magistrates have never been contested by Dexter.[21] There is no dispute that each magistrate "was a 'neutral, detached magistrate,' that he had a full opportunity for independent judicial determination of probable cause prior to issuing the warrant, and that he was able to 'focus searchingly on the question of obscenity. . .'" *Heller* v. *New York*.[22] In fact, the Fifth Circuit determined that the adversary hearings conducted by the magistrates were constitutionally sufficient under *Heller*.[23]

Because neither the District Court nor the Appellate Court challenged the propriety of the magistrates' rulings or the right of Petitioners to rely on the magistrates' orders, this case is not unlike *Hicks* where this Court held:

> "[E]ach step in the pattern of seizures condemned by the District Court was authorized by judicial warrant or order; and the District Court did not purport to invalidate any of the four warrants, in any way to question the propriety of the proceedings in the California Superior Court or even to mention the reversal of the suppression order in the Appellate Department of that court. *Absent at least some effort by the District Court to impeach the entitlement of the prosecuting officials to rely on repeated judicial authorization for their conduct, we cannot agree that bad faith and harassment were made out.* Indeed, such conclusion would not necessarily follow even if it were shown that the state courts were in error on some one or more issues of state or federal law." *Hicks,* supra, at 422 U.S. 351, 95 S.Ct. 2293. (Emphasis added)

21. Only the District Attorney and Chief of Police were sued. No suit was brought against any of the judges who ordered the arrests and seizures under §16.01.

22. 413 U.S. 483, 488, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973).

23. 559 F.2d 1297-1300.

The record in the present case contains no evidence of fraud, collusion, or other facts which would impeach the right of the Assistant District Attorney or the police officers to rely on repeated judicial authorization for their acts.[24]

C. Multiple Seizures Do Not Reflect Bad Faith.

The Circuit Court held that the District Court's finding of bad faith was corroborated by the repeated seizures of the film "Deep Throat" and that Petitioners should have "ordered" a single proceeding to determine whether the film should be banned pending a final determination of its obscenity by a jury.[25] 559 F.2d 1296-1297. The Court further held that the repeated seizures strongly evinced an intent to harass. 559 F.2d 1297. Such finding, however, ignores the decision in *Hicks* which dealt with facts almost identical to the instant case.

In *Hicks,* police officers, the district attorney and one of his assistants, pursuant to judicially authorized warrants, also made four separate seizures of the film "Deep Throat" from a single theater within a two-day period. Because the seizures were predicated upon repeated judicial authorization, this Court found no "pattern of seizures" demonstrat-

24. See *Grandco Corp.* v. *Rochford*, 536 F.2d 197 (7th Cir. 1976).

25. It should be noted that Petitioners had no legal authority to "order" any kind of judicial proceeding with respect to the film's obscenity. In Texas, such authority is vested in the judiciary.

ing bad faith or an intent to harass on the part of the authorities which would relieve a federal court from the strictures of *Younger*.[26]

As in *Hicks*, the District Court as well as the Appellate Court in this case erred in supporting a vague and conclusory finding of bad faith without impeaching the entitlement of the prosecuting officials to rely on repeated judicial authorization for the seizures.

D. Petitioners Exercised Good Faith in the Face of Judicial Intimidation by the District Court.

The Fifth Circuit Court concluded that bad faith and harassment were shown because no indictments were returned charging Dexter with violations of the Criminal In-

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26. The *Hicks* decision reinforces the court's holding in *Inland Empire Enterprises, Inc.* v. *Morton*, 365 F.Supp. 1014 (C.D. Cal. 1973), which held:

> "After each seizure of the film, the Plaintiff purchased a new print and attempted again to exhibit the film. The Defendant, acting in good faith to protect the community, believed correctly and constitutionally that each such new showing of a newly purchased copy of the film, 'Deep Throat' was a separate and distinct violation of the law. This Court concurs in that determination. Just as a new offense subject to arrest and seizure on a valid warrant is committed every day when a putative Defendant purchases other kinds of contraband such as heroin, cocaine or other narcotics, and then possesses, distributes and sells them, so also here when the Plaintiff every new day purchases a new copy of the film 'Deep Throat' determined by the Honorable Municipal Court Judge John Barnard and Gerald F. Shulte in their arrest and search warrants to be obscene, at least on probable cause, and then exhibits the same, he is subject to arrest and the film to seizure. Both sets of crimes are crimes, and there can be no gainsaying in quibbling about that. Since each such showing of each new film was and is a new and separate violation, this case is distinguishable from the fact situation in Veen v. Davis, *supra*, and Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (decided June 25, 1973). The films were properly seized each time pursuant to search warrants issued by a Judge in connection with the proposed prosecution of those charged with its exhibition."

struments Statute. 559 F.2d 1295. In so concluding, the Appellate Court pointed out that the District Court had given the District Attorney authority to indict Dexter even though the District Attorney and the Chief of Police were placed under multitudinous ten-day TRO's lasting for 339 days.[27] 559 F.2d 1296. Of importance, but not addressed by the Appellate Court, was the fact that Petitioners had requested on three occasions a determination of the abstention issues raised by *Younger*, and the District Court, refused to make such determination, tacitly accepting jurisdiction to determine the constitutionality of the Criminal Instruments Statute. The managing judge had decided early on that *Younger* was not going to stand in his way.

At the initial hearing held on August 12, 1974, before hearing any evidence, the managing judge of the three-judge panel expressed his aim to declare the Criminal Instruments Statute unconstitutional, believing it to be overbroad and vague. He reasserted that goal at the hearing held on November 15, 1974. Petitioners were thus left with the impression that an order declaring the Criminal In-

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27. It is interesting to note that the managing judge encouraged Petitioners to not continue in their prosecution until after he had made a determination on the constitutionality of the statute because it would be a waste of their time. In an exchange between counsel for Petitioner and the Court at the hearing on August 12, 1974, the District Judge commented:

> ". . . But we have these cases pending in all of these cities. All of them involve the same statutes that you and everybody else would be operating under, right?
>
> Wouldn't it be better, from the standpoint of an expeditious administration of justice, if we could get some definitive holding that the Texas statutes are either constitutional or unconstitutional, *so that you wouldn't have to waste your time and your money and your effort* and other people's time and effort to take each individual case up? Wouldn't that serve justice better?"

(Emphasis added)

struments Statute unconstitutional would be imminently forthcoming. Yet no ruling was made for approximately eleven months. To everyone's amazement, when the managing judge delivered the court's opinion eleven months later, he held the statute constitutional but found its application unconstitutional and admonished Petitioner for not seeking indictments during the interim to show good faith.

Petitioners' conduct in not immediately seeking indictments under the Criminal Instruments Statute was not only reasonable and justified but was a demonstration of restraint and good faith while awaiting the judge's decision, which Petitioners had been assured would be a decision declaring the statute unconstitutional.

From the inception of the managing judge's intrusion, it was clear that he would rule against Petitioners. Contrary to federal court procedures, the managing judge granted numerous written and oral TRO's of ten-days duration, rather than a temporary injunction because, as he stated, Petitioners would be unable to appeal his TRO's. On occasion, the orders lacked clarity as to the limit of the court's restraint upon Petitioners, but it was always clear that the court was accepting jurisdiction to decide the constitutional claim regardless of any *Younger* constraint.

The managing judge accepted jurisdiction, refusing to hear evidence on the *Younger* issues at the August 12, 1974, hearing, long before Petitioner Butler could have presented cases for grand jury indictment. Thereafter, Petitioner Butler had no recourse but to forego indictments and await the court's adverse ruling.

This Court should, therefore, take notice of the managing judge's conduct in the following respects:

1. His grant of all TRO's, both written and oral, without notice and hearing to Petitioners.

2. His novel approach in granting TRO's rather than a temporary injunction (which would necessitate a hearing) to escape a mandamus action by Petitioners.

3. His ambiguous language in the written TRO's.

4. His refusal on three occasions to grant Petitioners a hearing to dissolve the TRO's.

5. His refusal to even consider the abstention issues raised by *Younger* before considering the constitutionality of the Criminal Instruments Statute.

6. His pronouncements from the bench that the Criminal Instruments Statute would be declared unconstitutional.

In light of the foregoing state of affairs, Petitioners earnestly believed there was no longer any reason to actively pursue indictments and that indictments could possibly have invoked against them the contempt powers of the court. In effect, Petitioners were judicially intimidated into taking no further action in the criminal instruments cases, and thus, the court accomplished indirectly what *Younger* had precluded it from doing directly.

The managing judge's conduct in this case is the very type of conduct that this Court warned against in *Trainor* v. *Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977), in the following language:

> "For a federal court to proceed with its remedies in a pending state enforcement suit would confront the State with a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time

in the future. It would also foreclose the opportunity of the state to construe the challenged statute in the face of the actual federal constitutional challenges that would also be pending for decision before it, a privilege not wholly shared by the federal courts. Of course, in the case before us the state statute was invalidated and a federal injunction prohibited state officers from using or enforcing the attachment statute for any purpose. *The eviscerating impact on many state enforcement actions is readily apparent.* This disruption of suits by the State in its sovereign capacity, when combined with the negative reflections on the State's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending state proceeding, leads us to the conclusion that the interests of comity and federalism on which *Younger* and *Samuels* v. *Mackell, supra,* primarily rest apply in full force, here." *Trainor,* supra, at 97 S.Ct. 1919. (Emphasis added)

In this case, it is apparent that the actions of the managing judge had an "eviscerating impact" on Petitioners' good faith efforts to enforce the Criminal Instruments Statute.

E. The District Court Was Required to Abstain Under the Principles of Equitable Restraint Expressed in Younger v. Harris.

On at least four occasions, beginning with the original answer and motion to dismiss filed August 6, 1974, Petitioner requested that the court dissolve its TRO's and make a determination as to whether it should accept jurisdiction under the abstention requirements of *Younger* v. *Harris*[28] before considering the merits on the constitutionality of

28. 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

§16.01, the Criminal Instruments Statute. Each time the managing judge of the three-judge Court declined, on one occasion stating he wanted a case in which he could determine the constitutionality of §16.01.

The policy of equitable restraint expressed in *Younger,* is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights. Only if extraordinary circumstances render the court incapable of fairly and fully adjudicating the federal issues before it, can there be any relaxation of the deference accorded to the state criminal process.[29]

Respondent never pursued any of his remedies in State court. Instead, he has, with the aid of the federal court,

29. This Court in *Douglas* v. *City of Jeannette,* 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943) stated:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal cases as in a suit for injunction. Davis & Farnum Mfg. Co. v. City of Los Angeles, 189 U.S. 207, 23 S.Ct. 498, 47 L.Ed. 778; Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927. *Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and applications subject only to review by this Court on federal grounds appropriately asserted.* Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are, to be supported only on a showing of danger of irreparable injury 'both great and immediate.' Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95, 55 S.Ct. 678, 680, 79 L.Ed. 1322, and cases cited; Beal v. Missouri Pac. R.R. Corp., 312 U.S. 45, 49, 61 S.Ct. 418, 420, 85 L.Ed. 577: and cases cited; Watson v. Buck, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1461: Williams v. Miller, 317 U.S. 599, 63 S.Ct. 258, 87 L.Ed. ....." *Douglas,* supra, at 319 U.S. 163, 63 S.Ct. 881. (Emphasis added)

frustrated and paralyzed the just processes of the State. Rather than requesting an examining trial or filing a motion to suppress, motion for return of the seized property, motion for a second adversary hearing, or pursuing his writ of habeas corpus in the state court,[30] Respondent chose instead to forum-shop in the federal courts. *Younger* makes clear that the federal court should not offer assistance to a person who deliberately refuses to avail himself of state court remedies.

The District Court circumvented the principles of *Younger* by use of a "back-door" approach in first declaring the application of the Criminal Instruments Statute unconstitutional and then concluding that it was bad faith to apply the statute which was "manifestly inappropriate to the situation." Petitioners submit that if the court is allowed to determine the merits of the constitutional claim and then utilize that determination to make out a case of bad faith, then the *Younger* doctrine will become a nullity. Bad faith cannot be predicated upon mere disagreement by the District Court with state authorities on the constitutionality of the statute or its application. "Otherwise . . . the rule of *Younger* v. *Harris* would be swallowed up by its exception."[31]

The magistrates' application of the Criminal Instruments Statute on four occasions, although the managing judge of the three-judge District Court thought such action highly unusual, was insufficient to create extraordinary circumstances justifying federal interference. As stated in *Kugler* v. *Helfant*: "[S]uch circumstances must

30. Respondent failed to appear for the hearing in state court on his writ of habeas corpus challenging the validity of his arrest for violation of the Criminal Instruments Statute. See foonote 17, supra.

31. *Hicks*, supra, at 422 U.S. 352, 95 S.Ct. 2293.

be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation."[32]

In *Cameron* v. *Johnson*,[33] the plaintiffs sought federal injunctive and declaratory relief against the defendant state officials, who had arrested plaintiffs under the Mississippi anti-picketing law. According to the plaintiffs, the statute was overbroad and had been applied in an unconstitutional manner reflecting bad faith on the part of the defendants. This Court held that the mere possibility of erroneous application of the statute did not amount to the irreparable injury needed to invoke federal intervention in orderly state proceedings. Whether the plaintiffs were guilty or innocent of violating the statute was a matter for the Mississippi courts to resolve, the state officials were "not required to prove appellants guilty in the federal proceeding to escape the finding that the State had no expectation of securing valid convictions." *Cameron*, supra, at 390 U.S. 621, 88 S.Ct. 1341.

From the beginning of this litigation, the managing judge expressed his determination, irrespective of *Younger*, to select three cases in which he could rule upon the constitutionality of the Texas Criminal Instruments Statute, the Texas Nuisance Statutes,[34] and the Texas statute governing issuance of search warrants.[35] He was aware of the fact that there were pending criminal complaints filed in the state courts alleging violations of the Criminal Instruments statute. Yet he refused to relinquish his

32. 421 U.S. 117, 95 S.Ct. 1524, 1531, 44 L.Ed.2d 15 (1975).

33. 390 U.S. 611, 88 S.Ct. 1335, 20 L.E.2d 182 (1968).

34. Vernon's Tex. Civ. Stat., Art. 4664-4667.

35. Vernon's Tex. Code Crim. Proc. Ann., Art. 18.02.

jurisdiction or abstain to await a state court determination. The impact of his intrusion was just as sure and just as threatening as the procedure condemned in *Trainor*.[36] In the final analysis, the managing judge contravened the principles of *Younger* and effectively defeated any efforts by Petitioners to lawfully and in good faith enforce the Criminal Instruments Statute.

II.

Prosecutorial Immunity Includes Immunity From Attorney's Fees Awards.

The decision of the Fifth Circuit granting attorney's fees against a District Attorney for actions taken within the scope of his prosecutorial duties is in contravention of *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); furthermore, the Fifth Circuit Court presumed personal participation by Petitioners in the arrest and seizures despite the fact that the stipulated evidence shows no such participation.

The bad faith allegations made against Petitioner, Butler, are predicated upon one of his assistants filing criminal complaints against Dexter after arrests were ordered by the magistrates and upon Butler's decision to postpone seeking indictments of those cases until the federal court had ruled. The Appellate Court erroneously determined that such actions may fall outside the scope of prosecutorial duties as outlined in *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), so as to deprive the District Attorney of his absolute immunity from liability under 42 U.S.C. §1983. See the Court's opinion at 559 F.2d 1301, footnote 37.

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36. *Trainor* v. *Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977).

However, this Court in *Imbler* recognized that:

> "These [prosecutorial duties] include questions of *whether to present a case to a grand jury, whether to file an information, whether and when to prosecute,* whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present." *Imbler*, supra, at 96 S.Ct. 995, footnote 33. (emphasis added).

The actions taken by Butler or members of his staff were within the scope of their prosecutorial duties as expressed by this Court in *Imbler*, therefore, Butler is immune from liability for damages and attorney's fees for actions taken by members of his staff pursuant to judicial authorization.[37]

The subsequent enactment of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988, does not abrogate the immunity granted in *Imbler*. While §1988, like §1983, on its face admits of no immunities, it, too, must "be read in harmony with the general principles of tort immunity and defenses rather than in derogation of them." *Imbler*, supra, at 96 S.Ct. 989. In order to conclude that Congress intended an abolition of prosecutorial immunity there must be more than mere covert inclusion in the general language of the statute.[38] Significant in *Imbler* is the holding that the term "every person" in §1983, while facially admitting of no immunity, does not abrogate the historical immunity of prosecutors and judges.

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37. It should be noted that in *Imbler*, the plaintiff prayed for $2.7 million in damages and $15,000 in attorneys' fees. *All* relief was denied.

38. *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

The *Imbler* case establishes as well that prosecutorial immunity rises to the realm, and is equivalent to, absolute judicial immunity, which is historically steeped in the common law dating back to *Scott* v. *Stansfield,* L.R.3 Ex. 220 (1868), and later adopted in *Bradley* v. *Fisher,* 13 Wall. 335, 20 L.Ed. 646 (1872), and *Pierson* v. *Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). The rationale behind such immunity is: To insure that both judges and prosecutors "be at liberty to exercise their functions with independence and without fear of consequences." *Imbler,* supra, at 96 S.Ct. 989, footnote 12. The immunity is designed to serve the public's interest and applies even when a judge or prosecutor is accused of acting maliciously or corruptly. *Imbler,* supra, at 96 S.Ct. 989, 993.

For the Court to now distinguish awards of attorneys' fees from other monetary awards precluded by the immunity would not only erode the basis for the immunity, but would also indirectly defeat its purpose. There is little difference between attorney's fees and damages because both "cause a deflection of the prosecutor's energies from his public duties, and the possiblity that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler,* supra, at 96 S.Ct. 991.

III.

Petitioners Are Not Liable for Attorney's Fees Under the Doctrine of Respondeat Superior.

The lower courts held that Petitioners engaged in bad faith when San Antonio police officers seized projectors and arrested Dexter for possession of a criminal instrument pursuant to orders of the magistrates, and because an Assistant District Attorney filed felony charges at the behest of the magistrates. There is no evidence in the record to show that either Petitioner Butler or Petitioner Peters authorized, directed, or participated in the arrests, seizures or filing of criminal charges. The burden of proving wrongdoing on the part of Petitioners rested with Respondent.[39] Therefore, absent any evidence of wrongdoing, Respondent cannot impose vicarious liability for attorney's fees upon Petitioners under the doctrine of respondeat superior.[40] As stated in *Vinnedge* v. *Gibbs,* 550 F.2d 926 (4th Cir. 1977), "[l]iability will only lie if it is affirmatively shown that the official charged acted personally in the deprivation of the plaintiff's rights."[41]

Because the Assistant District Attorney filed charges and the police officers making the arrests and seizures were following the orders of magistrates in proceedings that were constitutionally sufficient their actions should receive the same judicial immunity enjoyed by the judges who authorized their actions.[42]

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39. See *Rizzo* v. *Goode,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); *Kostka* v. *Hogg,* 560 F.2d 37 (1st Cir. 1977).

40. *Kostka,* supra.

41. Accord: *Perry* v. *Jones,* 506 F.2d 778 (5th Cir. 1975); *Fisher* v. *Volz,* 496 F.2d 333 (3rd Cir. 1974); *Jennings* v. *Davis,* 476 F.2d 1271 (8th Cir. 1973).

42. See *Stadium Films, Inc.* v. *Baillargeon,* 542 F.2d 577 (1st Cir. 1976); *Pierson* v. *Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Scheur* v. *Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.E.2d 90 (1974); *Wood* v. *Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); and *United States* v. *Askew,* 486 F.2d 134 (5th Cir. 1973).

CONCLUSION

Because the ruling of the Court below conflicts with the decisions of this Court in *Hicks* v. *Miranda* and *Imbler* v. *Pachtman,* a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

KEITH W. BURRIS
District Attorney's Office
Bexar County Courthouse
San Antonio, Texas 78205

ALAN E. BATTAGLIA
Assistant Criminal District Attorney

DOUGLAS C. YOUNG
Assistant Criminal District Attorney
Attorneys for Petitioner Ted Butler

JANE HAUN MACON
City Attorney for San Antonio, Texas
City Hall
San Antonio, Texas 78205

STEVEN ARRONGE
Assistant City Attorney for San Antonio, Texas
Attorneys for Petitioner Emil Peters

CERTIFICATE OF SERVICE

I, Keith W. Burris, hereby certify that three (3) copies of this Petition for Writ of Certiorari were mailed by United States Mail, postage prepaid, to Gerald Goldstein, attorney for appellee, 2900 Tower Life Building, San Antonio, Texas 78205, on this the 15th day of March, 1979. I further certify that all parties required to be served have been served.

KEITH W. BURRIS
Assistant Criminal District Attorney
Bexar County, Texas
Bexar County Courthouse
San Antonio, Texas 78205

APPENDIX

APPENDIX A

UNIVERSAL AMUSEMENT COMPANY, INC., et al., Plaintiffs-Appellees,

v.

Carol VANCE et al., Defendants, State of Texas, Defendant-Appellant.

Richard C. DEXTER, Plaintiff-Appellee,

v.

Ted BUTLER, District Attorney of Bexar County, Texas, et al., Defendants-Appellants.

SOUTHLAND THEATRES, INC., et al., Plaintiffs-Appellees,

v.

Ted BUTLER, District Attorney of Bexar County, Texas, et al., Defendants-Appellants.

No. 75-4312.

United States Court of Appeals, Fifth Circuit.

Sept. 28, 1977.

Rehearing En Banc Granted Dec. 1, 1977.

In three cases involving challenges to Texas statutes dealing with showing of obscene films and actions taken

by local officials under other statutes against motion picture theaters, a three-judge District Court for the Southern District of Texas, John V. Singleton, Jr., J., 404 F.Supp. 33, entered judgment and appeals were taken. The Court of Appeals, Gee, Circuit Judge, held that: (1) statute authorizing suits to enjoin a nuisance, and if an establishment is adjudged a nuisance, providing for closing of establishment for one year, is inapplicable to premises used for exhibiting obscene material; (2) statute authorizing injunction after judicial determination that obscene material has been shown or distributed or manufactured on premises does not constitute a prior restraint; (3) statute creating the felony offense of possessing a "criminal instrument" does not apply to film projector used to exhibit obscene film; (4) seizure of theater's projector provided substantial support for finding of harassment and prosecution in bad faith; (5) hearings conducted at theatre substantially approximated adversary hearing where theater operator was given notice and an opportunity to be heard on question of obscenity and was advised that he could bring counsel to the proceedings; (6) as an evidentiary hearing might be necessary, court would remand case to district court for determination and award of attorney fees.

Reversed and rendered in one case; affirmed and remanded in second case.

Thornberry, Circuit Judge, dissented in part and concurred in part and filed opinion.

1. Nuisance (Key) 80

Statute authorizing suits in name of state to enjoin a nuisance and providing a one-year closing remedy for establishment adjudged a nuisance is inapplicable in actions involving exhibition of obscene films; statute authorizing

injunction against the commercial manufacture, distribution or exhibition of obscene material provides the exclusive procedure for abating obscene exhibitions as nuisances. Vernon's Ann.Tex.Civ.St. arts. 4664-4667, 4667(a)(3); U.S.C.A. Const. Amend. 1.

2. Nuisance (Key) 77

The attachment of the name "nuisance" to list of enjoinable activities in statute pertaining to commercial manufacture, distribution or exhibition of obscene matter was not intended to key in the remedies of statute providing for one-year shutdown of establishment adjudged a nuisance. Vernon's Ann.Tex.Civ.St. arts. 4664, 4666, 4667(a); U.S.C.A.Const. Amend. 1.

3. Constitutional Law (Key) 90.1(8)

Statute authorizing an injunction against the commercial manufacture, distribution or exhibition of obscene material after a judicial determination that obscene material has been shown or distributed or manufactured on premises does not constitute a prior restraint. Vernon's Ann.Tex. Civ.St. art. 4667(a)(3); U.S.C.A.Const. Amend. 1.

4. Nuisance (Key) 60

The penal code definition of "obscene" is referable to statute authorizing injunction against the commercial manufacture, distribution or exhibition of obscene material. Vernon's Ann.Tex.Civ.St. art. 4667(a)(3); V.T.C.A., Penal Code § 43.21.

5. Nuisance (Key) 80

Texas statute authorizing injunction against the commercial manufacture, distribution or exhibition of obscene

material authorized restraint of such expression only as is not constitutionally protected and is prohibited by state law. Vernon's Ann.Tex.Civ.St. art. 4667(a)(3); V.T.C.A., Penal Code §§43.21, 43.23; Rules of Civil Procedure Tex. rule 683; U.S.C.A.Const. Amend. 1.

6. Constitutional Law (Key) 90.1(1)

The term "final" as used in United States Supreme Court decision requiring the assurance of a prompt final judicial determination whether material is unprotected after the imposition of any restraint prior to judicial review bears the sense of supervening and does not refer to whether the judicial action taken is itself subject to further judicial consideration and possible reversal. Vernon's Ann.Tex.Civ.St. art. 4667(a)(3); V.T.C.A., Penal Code §§ 43.21, 43.23; Rules of Civil Procedure Tex. rule 683; U.S.C.A.Const. Amend. 1.

7. Burglary (Key) 12

Texas statute creating the felony offense of possessing a "criminal instrument" applies to such items as jimmies and safecracking tools; a film projector used to exhibit allegedly obscene films does not come within the statute. V.T.C.A., Penal Code §§ 16.01, 43.23.

See publication Words and Phrases for other judicial constructions and definitions.

8. Courts (Key) 508(7)

Seizure of theater's projector on ground that use of projector to exhibit allegedly obscene film rendered it a "criminal instrument," and arrest of theater operator who was under bond, provided substantial support for finding of harassment and prosecution in bad faith.

V.T.C.A., Penal Code § 16.01; Vernon's Ann.Tex.C.C.P. arts. 18.18, 23.03(a).

9. Obscenity (Key) 5

A temporary ban on a film is permissible as long as there is the requirement of a prompt adversary hearing at the state's initiation. U.S.C.A.Const. Amend. 1.

10. Obscenity (Key) 5

Adversary hearings, in the context of determining probable obscenity, need not be full-dress trial although the hearings must focus searchingly on the question of obscenity.

11. Obscenity (Key) 5

Hearings conducted at theater at which allegedly obscene film was being exhibited substantially approximated adversary hearings where theater operator was given notice and an opportunity to be heard, was advised that he could bring counsel and was invited to cross-examine the testifying officer and to introduce evidence.

12. Obscenity (Key) 5

Theater operator cannot object to an insufficiency which is of his own making in a hearing to determine probable obscenity. V.T.C.A., Penal Code § 16.01; Vernon's Ann.Tex.C.C.P. art. 18.18; U.S.C.A.Const. Amend. 1.

13. Federal Courts (Key) 953

Since parties to action challenging statutes dealing with showing of obscene films and actions taken by local officials against motion picture theaters agreed to appeal

from judgment of three-judge panel, even though the Supreme Court had vacated the panel's judgment for want of jurisdiction, inasmuch as costs would be determined with reference to what happened at the trial level, the managing judge of the three-judge court should hear the case on remand for determination and award of costs and attorney fees. 42 U.S.C.A. §§ 1981-1986, 1988.

14. Federal Civil Procedure (Key) 2743

Court of Appeals has discretion to award costs and fees arising out of an appeal. 42 U.S.C.A. §§ 1981-1986, 1988.

15. Civil Rights (Key) 13.17

County criminal district attorney and city's police chief were subject to awards of costs and attorney fees in suit for bad faith confiscation of theater's film projector even though case was pending when Congress revised Civil Rights Act by authorizing awards of legal expenses. 42 U.S.C.A. §§ 1981-1986, 1988.

16. Civil Rights (Key) 13.17

The Attorney's Fees Award Act of 1976 was intended to allow fee awards in pending cases unless the awards were "manifestly unjust." 42 U.S.C.A. §§ 1981-1986, 1988.

17. Civil Rights (Key) 13.8(1)

Although the Attorney's Fees Award Act of 1976 was intended to lift the veil of immunity from state and local governments to a limited degree, the Act does not change rules governing individual immunity for unconstitutional acts committed by a person acting in official capacity. 42 U.S.C.A. § 1988.

18. District and Prosecuting Attorneys (Key) 10
Officers (Key) 114

If the district court decides to award fees against persons in their individual capacities, it must respect the absolute immunity from money damages enjoyed by prosecutors as well as the qualified, good-faith immunity possessed by other government officials. 42 U.S.C.A. § 1988.

Max P. Flusche, Jr., Asst. Atty Gen., John L. Hill, Atty. Gen., David M. Kendall, First Asst. Atty. Gen., Joe B. Dibrell, Lonny F. Zwiener, Asst. Attys. Gen., Austin, Tex., for State of Tex.

Douglas C. Young, Keith W. Burris, Asst. Crim. Dist. Attys., San Antonio, Tex., for Butler.

Edgar Pfeil, Jane Haun Macon, Asst. City Attys., San Antonio, Tex., for Peters.

Frierson M. Graves, Jr., Memphis, Tenn., Gerald Goldstein, San Antonio, Tex., for R. C. Dexter and Southland.

Appeals from the United States District Court for the Southern District of Texas.

Before THORNBERRY and GEE, Circuit Judges, and MARKEY,* Chief Judge.

GEE, Circuit Judge:

Presented with a number of requests for appointment of three-judge district courts to hear challenges to Texas statutes dealing with obscenity, the Chief Judge of this circuit consolidated all such cases for trial before one three-judge district court in Houston. The managing judge of that court attempted to simplify its Brobdingnagian task

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*Of the United States Court of Customs and Patent Appeals, sitting by designation.

by choosing and setting for trial those three of the twenty consolidated cases which seemed to represent adequately the challenges of the remaining cases while presenting the fewest possible jurisdictional problems. We consider today the appeals from the district court's orders in two of these cases, 404 F.Supp. 33.[1]

I. KING ARTS THEATRE, INC. v. McCREA

The King Arts Theatre is an indoor, adults-only theater showing sexually explicit motion pictures in San Angelo, Texas. This lawsuit germinated from an apparently informal communication by the county attorney to the theater's landlord informing him that he would bring suit to enjoin future showings of pornographic films. The attorneys for the landlord then wrote to the owners of King Arts telling them of the impending suit and giving notice of termination of the theater's lease.[2] Shortly thereafter King Arts filed this suit seeking injunctive and declaratory relief from any action by the county attorney under the Texas statutes. The case was transferred to the three-judge court in Houston, and all parties agreed to stay their hands until the case could be decided.

That court concluded that *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), did not preclude granting the requested relief since no prosecution, civil or criminal, was pending. It also found, however, that prosecution under the Texas nuisance statutes would not cause irreparable injury and, so finding, declined to grant in-

1. The third was not appealed.

2. The district court asserts that this letter stated that the lease termination was at the county attorney's suggestion. 404 F. Supp. at 38. As the letter appears in the record before us, we find no such representation; the letter states only that the termination was to avoid the inconvenience and embarassment of joinder as a defendant in a suit to enjoin the showing of pornographic films.

junctive relief. It determined that Texas courts would construe the phrase "obscene material" in the applicable Texas nuisance statute[3] as the phrase was defined in Tex. Penal Code Ann. § 43.21 (Supp.1976), and upheld that definition against a claim of unconstitutional vagueness. Finally, it found that article 4667(a)(3), considered with articles 4665 and 4666 (which the court considered to be "companion statutes"), was unconstitutional on its face because it operated as an invalid prior restraint on the distribution of materials not yet judicially determined to be obscene. King Arts has not appealed from the denial of injunctive relief or the upholding of the Texas definition of obscenity.

[1] Our reading of the Texas nuisance statutes, articles 4664-67, dictates for us a narrower inquiry than that undertaken by the district court. Article 4666[4] provides

3. Tex.Rev.Civ.Stat.Ann. art. 4667(a)(3) (Supp. 1976):

(a) The habitual use . . . of any premises . . . for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof;

* * *

(3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material . . . .

4. Whenever the Attorney General, or the district or county attorney has reliable information that such a nuisance exists, either of them shall file suit in the name of this State in the county where the nuisance is alleged to exist against whoever maintains such nuisance to abate and enjoin the same. If judgment be in favor of the State, then judgment shall be rendered abating said nuisance and enjoining the defendants from maintaining the same, and ordering that said house be closed for one year from the date of said judgment, unless the defendants in said suit, or the owner, tenant or lessee of said property make bond payable to the State at the county seat of the county where such nuisance is alleged to exist, in the penal sum of not less than one thousand nor more than five thousand dollars, with sufficient sureties to be approved by the judge trying the case, conditioned that the acts prohibited in this law shall not be done or permitted to be done in said house. On violation of any condition of such bond, the whole sum may be recovered as a penalty in the name and for the State in the county where such conditions are violated, all such suits to be brought by the district or county attorney of such county.

for suits in the name of the State of Texas to enjoin a nuisance, and if an establishment is adjudged a nuisance under article 4666 there follows the rather draconian mandatory remedy of closing "said house . . . for one year from the date of said judgment," unless the owner provides a one- to five-thousand-dollar penal bond against future violations of the nuisance laws. The district court found that utilizing article 4666 to close a theater for showing obscene films "prevents the dissemination of that which is presumed to be legal and protected by the first amendment," that is, nonobscene films, as a concomitant of "preventing the dissemination of the unwholesome." 404 F.Supp. at 45. We agree that closing a theater under article 4666 for *all* uses for one year—even ameliorated by the provision for reopening under bond—would pose serious first amendment questions.[5] Such questions are not posed here, because we find article 4666's one-year closing remedy wholly inapplicable in actions such as this, since we read article 4667(a)(3)'s injunctive remedy as the exclusive procedure for abating obscene exhibitions as nuisances.

We note first that apparently no reported Texas cases have applied—or discussed the application of—the one-year abatement to premises used for manufacturing, dis-

5. *Compare 106 Forsyth Corp.* v. *Bishop*, 362 F.Supp. 1389 (M.D.Ga.1972), *aff'd*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044, 95 S.Ct. 2660, 45 L.Ed.2d 696 (1975), finding no first amendment violation in the revocation of a movie theater's license for up to twelve months after a determination at a prior adversary hearing that obscene films had been shown, *and Grove Press, Inc.* v. *Flask*, 326 F.Supp. 574 (N.D.Ohio 1970) (three-judge court), *vacated and remanded for further consideration in light of intervening decisions*, 413 U.S. 902, 93 S.Ct. 3026, 37 L.Ed.2d 1013 (1973), upholding state nuisance statutes which provided for voiding of leases and closing of establishments for up to one year after a full adversary hearing and determination that obscene movies had been exhibited, *with Avon 42nd Street Corp.* v. *Myerson*, 352 F.Supp. 994, 998 (S.D.N.Y.1972) (dictum) ("To permit the suspension of operation of a theatre on the basis of a prior conviction even for obscenity, amounts to an unconstitutional suppression of protected freedom of expression.").

tributing or exhibiting obscene material.[6] We thus write on a clean slate and must determine how Texas courts would interpret these nuisance statutes. Both article 4667 and articles 4664-66 have been on the Texas statute books since early in this century, but it was not until the 1973 amendment of article 4667 that obscenity was brought within the purview of either statute. Article 4664[7] defines three types of establishments as "common nuisances," the proprietor of which is guilty of "maintaining a nuisance": gambling houses, houses of prostitution, and places where intoxicating liquors are kept [the latter now being construed primarily as referring to places where liquor law violations take place. *State* v. *Parker*, 147 Tex. 57, 212 S.W.2d 132, 133 (1948)]. The language of article 4666 appears to refer back to article 4664 to explain what constitutes a nuisance: "Such a nuisance," "such nuisance," "said nuisance," "the acts prohibited in this law." Reinforcing this construction is the fact that articles 4664-66 were enacted by one bill and as one law. Tex.Laws, 2d Called Sess. 1923, ch. 24 at 57-58, and in this original pre-compilation form the references from section 4 (now article 4666) to section 1's (now article 4664's) definition of "nuisance" were even more stark, including references to the "county where the *above* nuisance is alleged to

6. Indeed, we find no indication in the record that the county attorney contemplated any remedy other than an injunction against the showing of obscene movies. So far as we can tell, the question of the one-year abatement was introduced by King Arts' pleadings, not by the county attorney.

7. Any hotel, rooming house or boarding house, country club, garage, rent car stand or other place to which the public commonly resort for board or lodging or commonly congregate for business or pleasure, where intoxicating liquors are kept, possessed, sold, manufactured, bartered or given away, or where intoxicating liquors are furnished to minors or to students of any educational institution, or where persons habitually resort for the purpose of prostitution or to gamble as prohibited by the Penal Code, is hereby declared to be a common nuisance. Any person who knowingly maintains such a place is guilty of maintaining a nuisance.

exist," for example, and to a penal bond "conditioned that the *acts prohibited in section 1 of this Act* shall not be done . . . ." With the 1923 recompilation of the Revised Civil Statutes, article 4667 came into being, combining several previous statutes providing for injunctive relief against gaming establishments, bawdy houses and "bucket shops," but it was placed (obviously) *after* the rearward-looking article 4666 with its one-year abatement remedy. Article 4667 did *not* denominate its various injunction-worthy activities as nuisances, so that an activity within the purview of article 4667 clearly was not subject to article 4666's one-year closing unless it also was an activity (i. e., gambling or prostitution) made a "common nuisance" by article 4664.

[2] The same 1973 amendment which brought the commercial manufacture, distribution or exhibition of obscene matter within the coverage of article 4667 also complicated the picture by inserting, for the first time, the word "nuisance" in article 4667:

> (a) The habitual use . . . of any premises, place or building or part thereof, for any of the following uses shall constitute a *public nuisance* . . . .

(emphasis added). But merely attaching the name "nuisance" to article 4667(a)'s list of enjoinable activities was not intended, we believe, to key in the remedies of article 4666. Had the legislature intended to apply the one-year closing sanction to pornographers' establishments, it could have more clearly signalled such an intent by adding to article 4664[8] appropriate language listing such obscenity-purveying establishments among the few "common nuisances" clearly subject to abatement under article 4666.

8. Which was also amended in 1973. The 1973 amendments to both articles 4664 and 4667 were part of a much larger bill enacting a new Texas Penal Code.

Perhaps the legislature foresaw the constitutional implications of shutting a communication-oriented business to *all* forms of expression, and to avoid potential trenching upon the first amendment, chose to authorize only the lesser constraint of an injunction against future exhibitions of unprotected obscene matter[9] by making article 4667, rather than article 4666, applicable to obscenity distribution. Whatever the legislature's motive, we think that even after the 1973 amendments article 4666 still refers solely to the nuisances defined in article 4664 and therefore that the district court in passing on the Texas nuisance statutes unnecessarily considered the effect of a one-year shutdown not authorized by Texas law.[10]

[3-5] This feature aside, we think article 4667(a)(3)'s injunctive procedure basically sound in its application to establishments such as King Arts. The statute authorizes an injunction against the commercial manufacture, distribution or exhibition of *obscene* material only. Because the injunction follows, rather than precedes, a judicial determination that obscene material has been shown or distributed or manufactured on the premises and because its prohibitions can apply only to further dealings with obscene and unprotected material, it does not constitute a prior restraint. Were a Texas court to issue an overbroad

9. *Miller* v. *California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

10. For the same reasons the district court's understandable concern about article 4665, which elevates proof that prohibited acts are committed in a place to the status of prima facie evidence that the proprietor knowingly permitted them to occur and permits proof that a house is such a nuisance by evidence of its general reputation, was similarly misplaced. Like article 4666, article 4665 seems to look to article 4664—speaking, for example, of "proof that any of *said prohibited acts* are committed in any of *said places*"—and was enacted contemporaneously with article 4664 as part of the same bill. Under our reading, article 4665 is unavailable in actions to enjoin the exhibition of obscene materials and need not be considered by us.

injunction restricting nonobscene (and therefore protected) matter, it would exceed both its constitutional and its statutory authority. While we might not be willing to assume with appellants that every state trial court granting an injunction on the authority of article 4667(a)(3) will draw up a lengthy order specifically enumerating the explicit details of the conduct prohibited, neither will we predict overly broad injunctions affecting protected expression. As we have noted, the district court correctly looked to section 43.21 of the Texas Penal Code for the definition of "obscene" referable to article 4667(a)(3) and found that section 43.21's definition, as construed by Texas courts, met or exceeded constitutional requirements as set down in *Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). An injunction which infringed first amendment rights would therefore necessarily exceed the court's authority under article 4667(a)(3); state appellate courts presumably stand ready to overturn orders which contravene either state statutes or the federal constitution. And a proprietor enjoined by an order proper under article 4667(a)(3) is prohibited from doing only that which he could not lawfully do anyway, since Texas law prohibits him from commercially exhibiting, possessing for sale, or distributing obscene material. Tex.Penal Code Ann. § 43.23(a)(1) (1974). A lawful injunction subjects him to no further guesswork, in determining what is and is not prohibited, than he must already engage in merely to comply with Texas law.[11] In short, as we read the Texas statutes, they authorize restraint of such expression only as is not

11. Under Texas law the injunctive order must "be specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained . . . ." Tex.R.Civ.P. 683. An order which enjoins the exhibition of obscene material, as the term is defined in the Penal Code, and provides no further guidelines is invalid under Texas Rule 683, wholly apart from first amendment considerations. *Richards* v. *State*, 497 S.W.2d 770, 778 (Tex.Civ.App. —Beaumont 1973, no writ).

constitutionally protected and is prohibited by state law. This is not the stuff of which first amendment violations are made.

Finally, we note that in concluding its opinion the court below expressed doubts about the validity of certain Texas procedural rules when applied in the context of obscenity.[12] Their defect is said to be a failure to provide for a prompt "final" judicial determination of whether matter is obscene or not *after* the issuance of temporary injunction, since a temporary injunction is by definition not a final order. This is said to be required by the Supreme Court's observation in *Freedman* v. *Maryland*, 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), reiterated in *Southeastern Productions* v. *Conrad*, 420 U.S. 546, 560, 95 S.Ct. 1239, 1247, 43 L.Ed.2d 448 (1975), that where obscenity questions are to be dealt with:

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

(original emphasis). But we do not think this passage bears the sense which the court below sought to place upon it, for the context of *Freedman* and of *Conrad*, in which these words were spoken, is quite different from the present one.

12. As it happens, these rules—primarily Texas Rules of Civil Procedure 680 and 681—are copied, with minor textual changes not relevant here, from Federal Rule 65. This circumstance, while of course it does not render the Texas rules inviolate, does lend a certain extension and moment to the court's remarks expressing doubt about their propriety.

[6] Under the Maryland scheme considered in *Freedman,* questioned material is drawn before the court only after and because of an earlier determination by an administrative board that it is obscene. The same was true in *Conrad,* a board having refused use of a municipal theater on grounds that a musical show was obscene. And the Supreme Court's concern, in the passages fixed on by the court below in this case, was that such matter should not be left to rest indefinitely in a state of provisional, administrative condemnation, that there should be a *final judicial* determination of its quality as obscene or not—as contrasted with the obtaining *tentative administrative* determination—within a short and definite period of time after its administrative interdiction. Thus the term "final" as used in *Freedman* and again in *Conrad* bears the sense of *supervening* and does not refer, as the lower court appears to have believed, and to whether the judicial action taken is itself subject to further judicial consideration and possible reversal.[13]

So understood, then, this passage from *Freedman* does not condemn or even concern such procedures as those of Texas (and our) courts by which temporary injunctions are granted or refused pending final hearings on the merits. There need be no supervening judicial hearing following the initial determination within some special, fixed period of time because the initial determination (at hearing on temporary injunction) was itself a judicial one, and there is no administrative decision to supervene. In sum, we find article 4667(a)(3) and the Texas procedures constitutional and therefore REVERSE the judgment of the district court to the contrary.

13. It is true that in *Freedman* the Court spoke of a "final judicial determination," though the context is a reference to "[a]ny restraint imposed in advance of" such a determination. 380 U.S. at 59, 85 S.Ct. at 739. But on the preceding page, the phrasing is "only a procedure requiring a judicial determination suffices to impose a valid final restraint." And on the page following, the phrase is merely "prompt judicial determination."

II. DEXTER v. BUTLER

On June 24, 1974, a San Antonio police officer entered the Fiesta Theater, where the film "Deep Throat" was showing. After viewing the theater's fare, the officer requested an "adversary hearing" to determine the film's probable obscenity, and, within an hour, a hearing took place at the theater itself. Among those attending the proceeding was the theater's operator, Richard Dexter, who had been advised to attend with counsel. At the conclusion of the hearing, the presiding magistrate issued a search warrant authorizing seizure not only of the film but also of the theater's projector, which the warrant characterized as a "criminal instrument" under section 16.01 of the Texas Penal Code. The complaining officer then arrested Dexter, filing charges against him for the misdemeanor offense of commercial obscenity[14] and for the felony offense of possessing a criminal instrument. This scenario was reenacted three times in the next two weeks,[15] the only variation being that, on the last occasion, the person arrested was not Richard Dexter but Wayne Walker, a theater employee.

14. Section 43.23 of the Texas Penal Code sets forth the offense of commercial obscenity as follows:

> (a) A person commits an offense if, knowing the content of the material:
>
> (1) he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition any obscene material;
>
> * * *
>
> (c) An offense under this section is a Class B misdemeanor unless committed under Subsection (a)(3) of this Section, in which event it is a Class A misdemeanor.

15. Arrests were made on June 24, June 28, July 2 and July 6, 1974.

Dexter sued in federal court, seeking an injunction against Ted Butler, Bexar County's Criminal District Attorney, and Emil Peters, San Antonio's Police Chief. The district court ruled the confiscation of the theater's projector bad-faith harassment under *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), because a film projector is clearly not a "criminal instrument" within the meaning of section 16.01, a device especially contrived for criminal purposes. The court also found bad faith in the repeated seizures of the theater's film; these were held to have contravened the Supreme Court's decision in *Heller* v. *New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973). Having made these determinations, the district judges enjoined all felony prosecutions against Dexter.

Simultaneous appeals were taken here and to the Supreme Court. The Court, concluding that the case had not warranted a three-judge panel because the district court had not questioned the constitutionality of any statute, vacated the lower court's judgment, allowing entry of a new decree and perfection of an appeal to this court. The parties later agreed to appeal from the original judgment in order to save time.[16]

The district court granted relief in a matter ordinarily confined to state judicial processes. *See Younger* v. *Harris*, 401 U.S. at 44-45, 91 S.Ct. at 750-51. The appropriateness of that action depends upon whether appellants were guilty of "harassment or prosecutions . . . in bad faith without hope of obtaining a valid conviction." *Perez* v. *Ledesma*,

16. Appellants have challenged the composition of the three-judge panel because the judge who first heard the request for injunctive relief was not included on the panel as 28 U.S.C. § 2284 requires. This question was mooted when the Supreme Court vacated the three-judge court's decision and the parties agreed to appeal from the existing judgment rather than waiting for a new decree.

401 U.S. 82, 85, 91 S.Ct. 674, 677, 27 L.Ed.2d 701 (1971). In deciding this question we turn first to the seizure of Fiesta Theater's projector.

[7] Section 16.01 of the Texas Penal Code creates the felony offense of possessing a "criminal instrument" which the statute defines as "anything that is specially designed, made, or adapted for the commission of a crime." As the lower court noted, the statute obviously applies to such items as jimmies and safecracking tools, the possession of which unmistakably indicates that criminal conduct is afoot. The correctness of this interpretation is confirmed by the following portion of the "Practice Commentary" that accompanies section 16.01:

> [The statute] aims at terminating incipient criminal activity, the existence of which is indicated by conduct involving a "criminal instrument." The mere possession or manufacture of things specially designed for the purpose of accomplishing a criminal objective is strong evidence of criminal intent. The instrument must be *specially* designed, made, or adapted for the commission of an offense, however; things frequently used in a crime, but which have common, lawful uses, are excluded from the purview of Section 16.01 because possession of such things alone, is conduct too ambiguous for the imposition of the criminal sanction.

(emphasis in original). Relying on the above commentary,[17] the district court read section 16.01 as clearly in-

17. Appellants have objected that the Practice Commentary is entitled to little weight since it lacks the status of law. The objection would have more force if the commentary did more than restate the obvious meaning of § 16.01 and if the Texas Court of Criminal Appeals had not recently approved of the manner in which the lower court interpreted the statute. *See Fronatt* v. *State*, 543 S.W.2d 140 (Tex.Crim.App. 1976).

applicable to film projectors, which accommodate lawful movies as easily as obscene ones. Appellants respond that a projector has no lawful use when it carries a reel containing an obscene film. With this argument we cannot agree. Section 16.01 punishes criminal intent, and it is possession of an obscene movie that evinces an intent to display illegal material; whether one also has a projector is irrelevant. This point is underscored by article 18.18 of the Texas Code of Criminal Procedure, which dictates destruction of any "criminal instrument," as that term is defined in the Penal Code. This provision has its purpose in preventing criminal acts, a goal hardly advanced by junking theater projectors.

[8] The seizure of Fiesta Theater's projector provides substantial support for the district court's finding of harassment and prosecution in bad faith. The multiplicity of the seizures dispels the likelihood of an honest mistake to the same extent that the language of section 16.01 must have dispelled any hope of obtaining Dexter's conviction. What makes this case an even more compelling one is the district attorney's failure to seek grand jury indictments on the felony charges against Dexter, which has frustrated prompt adjudication of the propriety of state efforts to curb speech.[18] *See Dombrowski* v. *Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). This prosecutorial inaction also implies that law enforcement officials recognized they were acting illegally and knew they could not obtain convictions on the felony charges.

18. Appellants cite Dexter's motions for continuance in his misdemeanor trial as evidence that he was not anxious for a determination of his guilt or innocence in state court. We fail to see how these dilatory motions prove that Dexter would not have been quick to resist felony charges, something we will never know because of the district attorney's failure to obtain felony indictments.

Appellants have attempted to explain their neglect in seeking grand jury indictments by blaming the district court's pretrial restraining order. This seemingly interminable order, which we can hardly call "temporary" since it was successively extended for 339 days,[19] originally enjoined Butler and Peters "from further seizures of the firm 'Deep Throat' at the Fiesta Theater, San Antonio, Texas, and from arresting plaintiff [Dexter] or employees of said theater, for so long as 'Deep Throat' is showing at the Fiesta Theater." Appellants argue that securing indictments against Dexter would necessarily have entailed arresting him in violation of the court's restraining order because (1) under Texas law a capias must issue upon a grand jury indictment, and (2) Dexter's absence from the state required his arrest and extradition for trial. But the obvious design of the original restraining order was to prevent further efforts by law enforcement officials to halt the exhibition of "Deep Throat." Read in context, the order's prohibition against arresting Dexter meant that the police were to cease their raids upon the theater; it did not prevent the district attorney from taking whatever actions were necessary to carry out Dexter's prosecution. This interpretation of the order is borne out by the transcript of a conference that occurred on August 12, 1974, between both parties to this suit and Judge Singleton, the managing judge of the district court. In that conference Judge Singleton informed both the defense and the prosecution that the court would not enjoin prosecution of

19. The first restraining order quoted in the text, was issued by Judge Singleton following an ex parte hearing conducted on July 29, 1974. Twelve days later the order was extended, and in an August 12 conference Judge Singleton announced that the restraining order would be successively extended, regardless of whether additional, written orders were decreed. Finally, on September 6, 1974, the court superseded its original restraining order with another one, which was to remain in effect pending disposition of the case.

pending state cases.[20] This was reiterated shortly thereafter in the trial court's order of September 6, which superseded its original restraining order. The latter order retained the injunction against further arrests of Dexter but expressly provided that "no pending state criminal prosecutions are enjoined and the State is free to bring to trial and try any such cases."

Even had the district attorney been in doubt about the scope of the original restraining order, we would still affirm the three-judge panel's finding of bad faith because Dexter's indictment would not have necessitated his arrest. Article 23.03(a) of the Texas Code of Criminal Procedure clearly makes issuance of a capias unnecessary when the indictee is under bond, as Dexter had been ever since his first arrest.[21] As for Dexter's alleged absence from the state, we fail to see how his flight would have prevented the district attorney from obtaining indictments against him, although it may have precluded an immediate trial. In any event, appellants have offered so little proof of Dexter's alleged out-of-state excursion that we cannot de-

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20. The following conversation took place at the hearing:

MR. BURRIS: Your honor, could I ask one question? Now, your prior temporary restraining order has not been in such language as to restrain us from prosecuting our present criminal cases. It's been an injunction against further arrests and seizures of film.

THE COURT: I don't think I am going to enjoin you from prosecuting these pending criminal cases. . . .

21. Art. 23.03 of the Code of Criminal Procedure reads as follows:

(a) A capias shall be immediately issued by the district clerk upon each indictment for felony presented, or upon the request of the attorney representing the State, the summons shall be issued by the district clerk, and shall be delivered by the clerk or mailed to the sheriff of the county where the defendant resides or is to be found. A capias or a summons need not issue for a defendant in custody or under bond.

termine its duration or even whether it in fact occurred.[22] All we do know is that Dexter was arrested during the third raid on the Fiesta Theater and that he personally appeared at the trial of his misdemeanor charges, which began on November 11, 1974, four days before the district court heard arguments in this case. Dexter's whereabouts between these two dates are not shown with any clarity. Moreover, the record makes it appear very possible that the district attorney's office first received information about Dexter's absence after it had already learned the district court did not intend to enjoin prosecution of charges pending against Dexter.[23] If so, Dexter's flight could not have weighed in the decision whether to proceed with the prosecution of his felony charges.

The trial court's finding of bad-faith harassment is further corroborated by the repeated seizings of the film "Deep Throat." Assuming for the moment that appellants could have temporarily barred the film's exhibition following the initial adversary hearing held at the theater,

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22. Appellants offer three items of evidence to prove that Dexter fled the state. First, they adduce an affidavit of the Chief of the Special Crimes Division of the Bexar County District Attorney's Office. This affidavit merely mentions a statement by Dexter's attorney that his client was out of the state. Second, appellants produce the transcript from a hearing on one of Dexter's continuance motions in his misdemeanor trial. In that hearing Dexter's newly retained counsel stated he did not know where his client was. Third, and least persuasive, appellants advert to that portion of the transcript from the August 12 conference with Judge Singleton in which defense counsel, Mr. Burris, describes Dexter as a "fugitive out [sic] Memphis, Tennessee."

23. Dexter's misdemeanor trial was originally set for September 16, 1974. From the record, it appears that the district attorney's office first concluded that Dexter was absent from the state when a summons for his appearance at the misdemeanor trial was returned unserved. This suggests that the prosecutor first believed that Dexter had fled the state long after the August 12 pretrial conference in which Judge Singleton advised that the restraining order did not prevent prosecution of pending cases, and perhaps even after the order of September 6, which removed any doubt on that score.

we fail to see why the district attorney did not order a single proceeding, the stated purpose of which was to determine whether "Deep Throat" should be banned until a jury determination of the film's obscenity. Instead, appellants repeatedly confiscated the film, following hearings whose only avowed purpose was to decide whether police could seize evidence of a reported crime and arrest a reported misdemeanant. This conduct strongly suggests an intent to harass. *Cf. Tyrone, Inc.* v. *Wilkinson*, 410 F.2d 639, 642 (4th Cir.), *cert. denied*, 396 U.S. 985, 90 S.Ct. 478, 24 L.Ed.2d 449 (1969). *But see Inland Empire, Inc.* v. *Morton*, 365 F.Supp. 1014 (C.D.Cal.1973).[24]

Having found ample grounds for affirming the trial court's holding, we need not examine the question whether appellants' repeated seizures of Fiesta Theater's film contravened the Supreme Court's decision in *Heller* v. *New York*.[25] Nonetheless, since this case presents issues representative of the twenty cases consolidated before the three-judge court, we believe a brief discussion is appropriate.

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24. The district court in *Inland Empire* refused to enjoin repeated seizure of the film "Deep Throat," noting that each showing of the motion picture was a separate offense "[j]ust as a new offense subject to arrest and seizure on a valid warrant is committed every day when a putative Defendant purchases other kinds of contraband such as heroin, cocaine or other narcotics, and then possesses, distributes and sells them." 365 F.Supp. at 1017. The seizures at issue in *Inland Empire* were made pursuant to search warrants; adversary hearings did not precede the issuance of the warrants nor did they promptly follow.

In disagreeing with the analysis of the court in *Inland Empire*, we observe the following statement:

> It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband.

A Quantity of Copies of Books v. *Kansas*, 378 U.S. 205, 211-12, 84 S.Ct. 1723, 1726, 12 L.Ed.2d 809 (1964).

25. 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973).

Heller contains the Supreme Court's latest discussion of the necessity of holding an adversary hearing before seizing an allegedly obscene film.[26] The crux of the *Heller* opinion is this statement:

> If such a seizure [of film solely for the purpose of preserving evidence] is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a

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26. Twice the Supreme Court has declined to decide whether an adversary hearing must precede the seizure of obscene material pursuant to a search warrant. *See McGrew* v. *City of Jackson*, 401 U.S. 987, 91 S.Ct. 1221, 28 L.Ed.2d 525 (1971), *vacating* 307 F.Supp. 754 (S.D.Miss.1970) (holding pre-seizure hearing unnecessary); *Hosey* v. *City of Jackson*, 401 U.S. 987, 91 S.Ct. 1221, 28 L.Ed.2d 525 (1971), *vacating* 309 F.Supp. 527 (S.D.Miss.1970) (holding pre-seizure hearing unnecessary). Both cases were vacated and remanded in light of *Younger* v. *Harris*, *supra*, and *Samuels* v. *Mackel*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971).

In yet another case the Supreme Court avoided deciding whether the first amendment permits issuance of an ex parte temporary injunction against the sale or display of obscene material when an adversary hearing is required within two days. *ABC Books, Inc.* v. *Benson*, 401 U.S. 988, 91 S.Ct. 1228, 28 L.Ed.2d 525 (1971), *vacating* 315 F.Supp. 695 (M.D.Tenn.1970) (holding injunction proper). This case was also vacated and remanded in light of *Younger* v. *Harris*, *supra*, and *Samuels* v. *Mackel*, *supra*. The Court later vacated this case again, 413 U.S. 904, 93 S.Ct. 3028, 37 L.Ed.2d 1015 (1973), this time in light of *Heller* v. *New York*, *supra*, and its companion cases: *Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); *Kaplan* v. *California*, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); *United States* v. *Twelve 200-foot Reels of Super 8mm Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973); *United States* v. *Orito*, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); *Roaden* v. *Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973); *Alexander* v. *Virginia*, 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993 (1973).

> judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned.

413 U.S. at 493-94, 93 S.Ct. at 2795 (footnotes omitted). Thus, the Court in *Heller* held that an adversary hearing need not precede the seizure of a film, if the seizure will not significantly interfere with the film's exhibition. The district court in this case concluded, correctly, that appellants' persistent seizures of Fiesta Theater's film were a significant restraint on the continued exhibition of "Deep Throat" and then ruled that a course of seizures such as this was invalid absent a prior adversary hearing. Since the lower court found that the probable cause hearings conducted at the theater were not "adversary hearings," it therefore declared the seizures unlawful.

[9] Language in the district court's opinion suggests it believed that a film cannot be banned even temporarily before a trial on the merits.[27] If this is what the court meant to say, we do not agree, for in *Heller* the Court clearly contemplated pretrial adversary hearings. *See* 413 U.S. at 490, 93 S.Ct. at 2793-94. Moreover, in the recently affirmed case of *Freedman* v. *Maryland, supra*,[28] the Supreme Court held that a film's exhibition can be temporarily restrained even without a prior adversary hearing

27. In commenting upon the sufficiency of the probable cause hearings conducted at the Fiesta Theater, the court stated:

> The fact that the magistrate notified the attorney and gave him the opportunity to appear at a "hearing"—which consisted of nothing more than the testimony of the police officer and the viewing of the film [sic] does not transform San Antonio's procedures into an adversary hearing, *the results of which would have the force and effect of a final adjudication of obscenity.*

404 F.Supp. at 49 (emphasis added).

28. *See Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

if specific procedural safeguards are observed. Since the *Heller* Court discussed *Freedman* approvingly,[29] we must conclude that a temporary ban on a film is permissible as long as there is the requirement of a prompt adversary hearing at the state's initiation.[30] Two other circuits agree with our reading of *Heller*. In *United States* v. *Pryba*, 163 U.S.App.D.C. 389, 502 F.2d 391 (1974), *cert. denied*, 419 U.S. 1127, 95 S.Ct. 815, 42 L.Ed.2d 828 (1975), the D.C. Circuit stated that pre-seizure hearings are necessary when large quantities of allegedly obscene material are confiscated for the sole purpose of destruction but expressly sanctioned post-seizure hearings in other cases.

29. 413 U.S. at 489-90, 93 S.Ct. at 2793. *See also McKinney* v. *Alabama*, in which the Court cited *Freedman* and *Heller* in tandem, describing them as cases establishing procedures sensitive to first amendment freedoms. 424 U.S. 669, 673, 96 S.Ct. 1189, 1193, 47 L.Ed.2d 387 (1976).

30. Despite *Freedman* v. *Maryland*, it is still theoretically possible to argue that an adversary hearing must *always* precede the imposition of even a temporary ban on a film. The *Freedman* case can be distinguished as involving a temporary restraint imposed before a film is exhibited; when a film is seized during its exhibition, one can contend that a greater procedural protection should be provided since greater disruption of a theater's operations ensues. On several occasions the Supreme Court has given weight to business considerations in determining the validity of procedures by which film exhibitions are stopped. *See Roaden* v. *Kentucky*, 413 U.S. 496, 503-04, 93 S.Ct. 2796, 2801, 37 L.Ed.2d 757 (1973). Specifically has the Court noted a theater operator's need for planning a schedule of his feature films. *See Freedman* v. *Maryland*, 380 U.S. at 61, 85 S.Ct. at 740. Nevertheless, this argument seems foreclosed by the *Heller* Court's express approval of *Freedman* in the context of discussing procedures that must be followed when law enforcement officials seize films then being exhibited.

A further argument can be made supporting the proposition that adversary hearings must be held before any restraint is imposed on a film's exhibition. In *A Quantity of Copies of Books* v. *Kansas, supra*, the Court held that a judicial determination of obscenity in an adversary proceeding is necessary before officials can seize large quantities of books for the sole purpose of destroying them. *See also Marcus* v. *Search Warrants of Property*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). In *Heller* v. *New York* the Court, through Chief Justice Burger, reaffirmed *A Quantity of Books*, noting its applicability in any case involv-

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502 F.2d at 405. And in *G. I. Distributors, Inc.* v. *Murphy*, 490 F.2d 1167 (2d Cir. 1973), *cert. denied*, 416 U.S. 939, 94 S.Ct. 1941, 40 L.Ed.2d 290 (1974), the Second Circuit, speaking through Judge Lumbard, upheld a prehearing seizure of 19,000 copies of publications because the state had conducted an adversary hearing on the morning following the confiscation.[31] Judge Lumbard specifically rejected the argument that the *Heller* opinion "condemned all prehearing seizures, except those in which a limited number of copies of the allegedly obscene materials are seized solely for evidentiary purposes." 490 F.2d at 1168.

[10-12] Finally, we turn to the lower court's ruling that the adversary hearings afforded Dexter were con-

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Footnote continued—

ing a "large-scale seizure of books, films, or other materials presumptively protected under the First Amendment." 413 U.S. at 491, 93 S.Ct. at 2794. In the case that next appears in Volume 413 of the United States Reports, *Roaden* v. *Kentucky*, *supra*, the Chief Justice again speaking for the Court, stated that "[s]eizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a book store." 413 U.S. at 504, 93 S.Ct. at 2801. Juxtaposing these passages, one can argue that *A Quantity of Books* applies to any restraint placed upon a film then being shown. What this argument fails to take into account is the *Heller* Court's emphasis on the purpose of the seizures in both *A Quantity of Books* and *Marcus* v. *Search Warrants*—namely, the destruction of the seized material. A seizure for this purpose would require a prior adversary hearing, since a hearing held after the material's destruction would be useless. The same is not true of a hearing promptly following the imposition of a temporary restraint on a film's exhibition. *Cf. United States* v. *Pryba*, 163 U.S.App.D.C. 389, 502 F.2d 391, 405 (1974), *cert. denied*, 419 U.S. 1127, 95 S.Ct. 815, 42 L.Ed.2d 828 (1975) (noting that seizure "solely for the purpose of destruction" demands greater procedural safeguards than does seizure "with a view to absolute suppression"); *G. I. Distributors, Inc.* v. *Murphy*, 490 F.2d 1167 (2d Cir. 1973), cert. denied, 416 U.S. 939, 94 S.Ct. 1941, 40 L.Ed.2d 290 (1974) (upholding prehearing seizure of 19,000 copies of publications pending adversary hearing on the following morning).

31. The *Murphy* case reinstated the court's former decision, which the Supreme Court had vacated and remanded in light of *Heller* v. *New York* and its companion cases. *See* 413 U.S. 913, 93 S.Ct. 3056, 37 L.Ed.2d 1033 (1973).

tutionally insufficient. In response to this finding, we wish to restate established law. Adversary hearings, in the context of determining probable obscenity, need not be full-dress trials, *see Tyrone, Inc.* v. *Wilkinson*, 410 F.2d at 642; *Sims* v. *Dial*, 350 F.Supp. 747 (W.D.Tex.1972); *Miske* v. *Spicola*, 314 F.Supp. 962 (M.D.Fla.1969), although it is now axiomatic that hearings must "focus searchingly on the question of obscenity." *Marcus* v. *Search Warrants*, 367 U.S. 717, 737, 81 S.Ct. 1708, 1716, 6 L.Ed.2d 1127 (1961). The Supreme Court's decision in *Heller* v. *New York* gives perhaps more concrete guidance by likening an adversary proceeding to a hearing on a pretrial motion, 413 U.S. at 490-91, 93 S.Ct. at 2794, which implies notice and an opportunity to be heard as minimum requirements. We do not understand the *Heller* Court, however, to prescribe identical procedures for adversary hearings on both pretrial motions and questions of probable obscenity. One difference between these types of hearings is that a proceeding to determine probable obscenity may properly be held on rather short notice, since those who exhibit films of questionable legality should be prepared to defend their offerings within a relatively brief period of time. *Braha* v. *Texas*, 319 F.Supp. 1331 (W.D.Tex.1970). In viewing these considerations, we believe that the hearings conducted at the Fiesta Theater substantially approximated adversary hearings, although we do not reach the precise factual question of their sufficiency. Dexter was given notice[32] and an opportunity to be heard on the question of obscenity. He was advised that he could bring counsel to the proceedings and, during the July 28 hearing, was even

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32. Dexter was given notice one-half hour before the hearing took place on June 28 and one hour before the July 2 proceeding. On the first occasion the presiding magistrate expressed willingness to delay the hearing if Dexter so desired. We do not determine the factual question whether Dexter received adequate notice on either of these dates.

encouraged to do so. Dexter was also invited to cross-examine the testifying officer and to introduce evidence. At least one reason why the adversary hearings appear to have been rather summary is that Dexter did not fully participate in them. Obviously, a theater operator cannot object to an insufficiency which is of his own making in a hearing. *See United States* v. *Pryba*, 502 F.2d at 406. *Cf. Heller* v. *New York*, 413 U.S. at 490-91, 93 S.Ct. at 2794.

The judgment of the district court is AFFIRMED.

III. ATTORNEYS' FEES

[13, 14] Both Dexter and King Arts seek a remand for a determination and award of costs and attorneys' fees, the latter assessment being authorized by the Attorney's Fees Award Act of 1976, Pub.L. 94-559, 90 Stat. 2641 (1976), which revised 42 U.S.C. § 1988 to permit awards of legal expenses to prevailing parties in suits brought under the Civil Rights Acts, 42 U.S.C. §§ 1981-86.[33] King Arts has not prevailed and is, of course, not entitled to such relief. We remand Dexter's case with directions for the trial court[34] to set reasonable attorneys' fees in accordance with the standards set forth in *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), and reaffirmed in *Rainey* v. *Jackson State College*, 551 F.2d 672 (5th Cir. 1977). Although we have discretion to award

33. The relevant portion of revised § 1988 reads as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

34. Since the parties agreed to appeal from the district court judgment, and since costs must be determined with reference to what happened at the trial level, we believe that the managing judge of the three-judge court should hear this case on remand, even though the Supreme Court vacated the panel's judgment for want of jurisdiction.

costs and fees arising out of an appeal to this court, *see Moten* v. *Bricklayers International Union*, 177 U.S.App. D.C. 77, 543 F.2d 224, 240 (1976); *Globe Life & Accident Insurance Co.*, 402 F.2d 295 (5th Cir. 1968), considerations of judicial economy call for the district court to determine the total award in this case, *see Panior* v. *Iberville Parish School Board*, 543 F.2d 1117, 1120 (5th Cir. 1976), especially since an evidentiary hearing may be necessary, *see Moten* v. *Bricklayers International Union*, *supra* at 240.

[15-18] Appellants Butler and Peters contend that they are not subject to such awards because this case was pending when Congress revised section 1988, but we have disposed of that contention in *Rainey* v. *Jackson State College*, *supra*. As the *Rainey* court observed, the legislative history of the Attorney's Fees Act makes plain Congress' intent to allow fee awards in pending cases unless the awards are "manifestly unjust."[35] 551 F.2d at 676. We do not consider them to be so in this case.

A more difficult question is, against whom can the district court direct its award? Again, we consult the legislative history that accompanies Congress' revision of section 1988:

> As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases [inter alia, cases brought under the Civil Rights Acts, 42 U.S.C. §§ 1980-86] are often State or local

35. The House Report to the Act stated that, "[i]n accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases." H.R.Rep. No. 94-1558, 94th Cong., 2d Sess. 4, n. 6 (1976). The legislation's applicability to pending cases was also noted during the floor debates. *See* 122 Cong. Rec. S17,052 (daily ed. Sept. 29, 1976) (remarks of Sen. Abourezk); 122 Cong. Rec. H12,155 (daily ed. Oct. 1, 1976) (remarks of Rep. Anderson); 122 Cong. Rec. H12,160 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan); 122 Cong. Rec. H12,166 (daily ed. Oct. 1, 1976) (remarks of Rep. Ashbrook).

bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity,[7] from funds of his agency or

7. Proof that an official had acted in bad faith could also render him liable for fees in his individual capacity, under the traditional bad faith standard recognized by the Supreme Court in *Alyeska* [*Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)]. *See Class* v. *Norton*, 505 F.2d 123 (2d Cir. 1974); *Doe* v. *Poelker*, 515 F.2d 541 (8th Cir. 1975).

under his control, or from the State or local government (whether or not the agency or government is a named party).

S.Rep. No. 94-1011, 94th Cong., 2d Sess. 5 & n. 7, *reprinted in* [1976] U.S.Code Cong. & Ad.News pp. 5908, 5913 (footnote omitted). Although, as the above passage makes clear, Congress intended to lift the veil of immunity from state and local governments to this limited degree,[36] the last sentence in the passage makes it equally clear that the Attorney's Fees Award Act does not change judicially established rules governing individual immunity for unconstitutional acts committed by a person acting in official capacity. Thus, if the district court decides to award fees against persons in their individual capacities, it must respect the absolute immunity from money damages enjoyed by prosecutors, *see Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), as well as the qualified, goodfaith immunity possessed by other government officials, *see Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992,

36. Cases so holding have relied on Congress' power under the enforcement clause of the fourteenth amendment as construed in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). *See Bond* v. *Stanton*, 555 F.2d 172 (7th Cir. 1977); *Rodrigues* v. *Jimenez*, 551 F.2d 877 (1st Cir. 1977); *Rainey* v. *Jackson State College*, *supra*. *But see Skehan* v. *Board of Trustees*, 436 F.Supp. 657 (M.D.Pa.1977) (holding that the Attorney's Fee Award Act does not retract state immunity with sufficiently express language).

43 L.Ed.2d 214 (1975); *Scheur* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Consequently, any award of fees against individuals implicated in this case may require a hearing by the district court to develop facts not contained in the record, such as the scope and nature of the prosecutor's actions.[37] Likewise, awarding fees against city and state governments may require a hearing to determine such facts as whether city police were operating under the orders of state officials.

Accordingly, the lower court's judgment in *King Arts* is REVERSED, and decision is here RENDERED in accordance with our opinion. In *Butler* we AFFIRM and REMAND for further proceedings consistent with the above instructions.

THORNBERRY, Circuit Judge, dissenting in part, concurring in part:

In Part I of its opinion, the majority avoids what it admits to be "serious first amendment questions" by creating legislative intent from non-existent legislative history and by taking an abstruse view of relevant Supreme Court cases. Because a plain reading of the applicable Texas statutes and of those cases calls for a result contrary to that reached by the majority, I respectfully dissent. Moreover, while I concur in the result reached in Part II of the opinion, I cannot subscribe to the majority's use of a judicial shotgun when a small-caliber rifle would have sufficed.[1]

37. The Supreme Court has not resolved the thorny question whether prosecutors enjoy absolute immunity for acts other than initiating and pursuing a prosecution. *See Imbler* v. *Pachtman*, 424 U.S. at 430, 96 S.Ct. at 995.

1. At this point I should add that I concur in Part III of the opinion, although in my view King Arts also is entitled to a remand for a determination of attorneys' fees.

Taking the two portions in reverse order, I agree with the majority that bad-faith harassment is indeed "ample grounds for affirming the trial court's holding" in *Dexter* v. *Butler*. *Ante* at 1297. I would go no further, simply because such an excursion requires the Court to "decide" issues not essential to the disposition of the case before it.[2]

Part I of the opinion, however, necessitates more elaborate discussion. Article 4666 of the Texas statutes provides that upon "reliable information" that a nuisance exists, the attorney general, district attorney, or county attorney shall bring suit in the name of the State to abate or enjoin the nuisance. If the State is successful, there follows, as the majority aptly describes it, the "rather draconian remedy" of closing the premises for one year, unless the owner posts a penal bond of not less than $1,000 or more than $5,000 against future nuisance law violations. Article 4667, as amended in 1973, defines the commercial manufacture, distribution or exhibition of obscene material as a "public nuisance" and also sets forth a list of other nuisances, including gambling, prostitution, and bull fighting. The statute further provides that such activities "shall be enjoined at the suit of either the State or any citizen thereof."

In reversing the district court in *King Arts Theatre, Inc.* v. *McCrea*, the majority concludes that the one-year closing remedy provided in Article 4666 is inapplicable to obscenity and that the injunctive remedy under Article 4667 is "the exclusive procedure for abating obscene exhibitions as nuisances." *Ante*, at 1290. This strained interpretation ignores the plain language of the two statutes, and the majority is forced to support its conclusion with

2. The majority as much as concedes that its discussion of the adversary hearing question is dictum when it states that "we do not reach the precise factual question of [the] sufficiency [of the hearing]." *Ante*, at 1299.

suppositions about what the Legislature *may* have intended.[3]

In my view, Articles 4666 and 4667, taken together, allow the state to close, for one year, a theatre that has exhibited obscene films. Unless the bond is posted, the showing of *any* motion picture is punishable by contempt of court; thus, future conduct—which may fall within the purview of the First Amendment—is absolutely prohibited after a finding of undesirable and unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in the landmark case of *Near* v. *Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Of course, the theatre owner may post the bond and show films, but he forfeits that bond if one of the films he has selected is deemed obscene. The line between obscenity and protected speech is an extremely fine one, so fine that it is "dim and uncertain." *Bantam Books* v. *Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). As Justice Black pointed out:

> [N]o person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of "obscenity."

Ginzberg v. *United States*, 383 U.S. 463, 480-81, 86 S.Ct. 942, 952, 16 L.Ed.2d 31 (1966) (Black, J., dissenting). This particular dilemma has led Justice Brennan to observe:

3. For example, the majority states that "[p]erhaps the legislature foresaw the constitutional implications . . . and to avoid potential trenching upon the first amendment, chose to authorize only the lesser constraint of an injunction against future exhibitions of unprotected obscene matter . . . ." *Ante* at 1291. This is nothing more than conjecture, for as anyone familiar with Texas government is acutely aware, there is no such thing as a "legislative history" for acts of the legislature.

> The essence of our problem in the obscenity area is that we have been unable to provide "sensitive tools" to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into suppression of the latter.

Paris Adult Theatre v. *Slaton*, 413 U.S. 49, 79-80, 93 S.Ct. 2628, 2645, 37 L.Ed.2d 446 (1973) (Brennan, J., dissenting). Few of us, perhaps only Justice Stewart and Kurt Vonnegut's fictional Senator Rosewater,[4] can escape from this definitional quagmire, and this statutory scheme obviously encourages a theatre owner to steer wide of the danger zone by avoiding borderline films that are nonetheless protected under the First Amendment. This is self-censorship, a particularly subtle and most insidious form of censorship. *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

Even more troubling is the majority's conclusion that the injunctive procedure contained in Article 4667 satisfies the requirements of *Freedman* v. *Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), reaffirmed in *Southeastern Productions* v. *Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). The essence of these cases, as the district court pointed out, is that initial suppression of allegedly obscene material is permissible only for a brief, fixed period of time until a judicial determination is made and that final suppression is allowable only after

4. Justice Stewart, of course, knows obscenity when he sees it. *Jacobellis* v. *Ohio*, 378 U.S. 184, 196-97, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring). Senator Rosewater's primary accomplishment was a statute making the publication or possession of obscene materials a federal offense. The statute, Vonnegut wrote, "was a masterpiece because it actually defined obscenity." The definition: "Obscenity is any picture or phonograph record or any written matter calling attention to reproductive organs, bodily discharges, or bodily hair." K. Vonnegut, God Bless You, Mr. Rosewater 85 (Delta ed. 1965).

a judicial determination of obscenity in an adversary context. The Texas injunction procedures, which would apply to an action brought under Article 4667, do not provide for a short, fixed period of time in which a final determination of obscenity can be made and are thus inadequate under *Freedman*. As the district court wrote:

> Pursuant to [Rules 680-693a of the Texas Rules of Civil Procedure], the state could obtain a temporary restraining order lasting up to ten days, ex parte. As soon as possible, within that ten days, however, a hearing on a temporary injunction is obtainable. The temporary injunction is not a final adjudication on the merits but, once it is obtained, there is no provision for treating the [obscenity] case any differently from any other civil case. The lack of a provision for a swift final adjudication on the obscenity question raises serious doubts of the constitutional usability of the injunction process in Texas for an obscenity situation.

404 F.Supp. at 46.

The majority attempts to distinguish this process from *Freedman* by labeling *Freedman* as an "administrative" case in which the Court was dealing with a "tentative administrative determination." That is a distinction without a difference, for the Court's overriding concern in *Freedman* was the evil caused by the state's indefinite suppression of potentially protected speech without a judicial determination of whether the material is obscene. Here the evil lies in the fact that, under Texas procedure, the temporary injunction is tentative—not a ruling on the merits—and *Freedman* requires procedural safeguards that include, *inter alia*, the assurance of prompt judicial review on the merits.

Because I would affirm the district court's holding that the statutory scheme embodied in Articles 4666 and 4667 are unconstitutional insofar as they concern obscenity, I respectfully dissent from Part I of the majority opinion. I concur in the result reached in Part II, and, with the exception stated in footnote 1 of this opinion, I concur in Part III.

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, and RUBIN, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX B

UNIVERSAL AMUSEMENT
COMPANY, INC., et al.,

v.

Carol VANCE et al.

Richard C. DEXTER, Plaintiff-Appellee,

v.

Ted BUTLER, District Attorney of Bexar
County, Texas, et al.,
Defendants-Appellants.

No. 75-4313.

United States Court of Appeals,
Fifth Circuit.

Dec. 18, 1978.

Appeals from the United States District Court for the Southern District of Texas.

Max P. Flusche, Jr., Asst. Atty. Gen., John L. Hill, Atty. Gen., David M. Kendall, First Asst. Atty. Gen., Joe B. Dibrell, Lonny F. Zwiener, Asst. Attys. Gen., Austin, Tex., for State of Texas.

Douglas C. Young, Keith W. Burris, Asst. Crim. D. Attys., San Antonio, Tex., for Butler.

Edgar Pfeil, Asst. City Atty., Jane Haun Macon, Steven W. Arronge, Asst. City Attys., San Antonio, Tex., for Peters.

Frierson M. Graves, Jr., Memphis, Tenn., Gerald H. Goldstein, San Antonio, Tex., for R. C. Dexter & Southland & King Arts.

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.*

PER CURIAM:

The en banc court adopts as its opinion herein so much of the panel opinion as commences at 559 F.2d 1286 following the sub-heading "II. *DEXTER* v. *BUTLER*." We supplement the portion of that opinion concerning attorneys' fees by reference to Part IV of our en banc opinion in the King Arts Theatre case handed down today, 587 F.2d 159 (5th Cir. 1978). It is so ORDERED.

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*Judge Morgan was a member of the en banc court under 28 U.S.C.A. § 46(c) and participated in the oral argument of the case en banc. Subsequently, the Omnibus Judgeship Bill, Public Law 95-486 (95th Congress) was approved October 20, 1978. In view of this, Judge Morgan does not participate in this decision.

APPENDIX C

UNIVERSAL AMUSEMENT CO., INC., et al.,

Carol VANCE et al.

KING ARTS THEATRE, INC., Plaintiff-Appellee,

v.

George E. McCREA et al., Defendants, the State of Texas, Defendant-Appellant.

No. 75-4312.

United States Court of Appeals, Fifth Circuit.

Dec. 18, 1978.

Three cases involving challenges to Texas statutes relating to obscenity were consolidated, and a three-judge District Court for the Southern District of Texas, John V. Singleton, Jr., J., 404 F.Supp. 33, held, inter alia, that the Texas statutes, construed together, amounted to an unconstitutional prior restraint on the distribution of materials not yet judicially determined to be obscene. The State of Texas appealed with respect to two cases, and a panel of the Court of Appeals, 559 F.2d 1286, reversed and rendered in one case and affirmed and remanded in the other case. Thereafter, the cases were ordered reheard en banc and the Court of Appeals, en banc, Thornberry, Circuit Judge, held that: (1) the appeal was properly before the Court; (2) the Texas statute which provides that an establishment adjudged a nuisance may be ordered closed for one year was inapplicable to obscenity; (3)

the Texas statute which provides that the use of any premises for the commercial manufacturing, distribution or exhibition of obscene material constitutes a public nuisance subject to injunction was unconstitutional insofar as it authorized injunctions against the future exhibition of unnamed films; (4) the Texas statute was also unconstitutional by reason of lacking required procedural safeguards, including a provision for prompt and final adjudication on the merits and (6) it was appropriate to remand to district court for a determination and award of costs and attorney fees.

Judgment of the panel of the Court of Appeals reversed and judgment of the District Court affirmed.

Gee, Circuit Judge, dissented in part and filed opinion in which Brown, Chief Judge, and Coleman, Ainsworth, Tjoflat and Vance, Circuit Judges, joined.

1. Federal Courts (Key) 1142

Because appeal was from grant of declaratory relief alone, the United States Supreme Court was without jurisdiction to hear a direct appeal by the State of Texas from three-judge district court's judgment that Texas nuisance statute, as applied to materials not yet judicially determined to be obscene, amounted to an unconstitutional prior restraint; therefore, appeal was properly before the Court of Appeals. 28 U.S.C.A. § 1253; U.S.C.A.Const. Amend. 1; Vernon's Ann.Tex.Civ.St. arts. 4664, 4666.

2. Federal Courts (Key) 612

In view of fact that question of *Younger* abstention is nonjurisdictional, question was not properly before the Court of Appeals where it was not raised before district court.

3. Constitutional Law (Key) 90.1(1)

While obscenity is not protected by the First Amendment, state regulation must not be permitted to impinge upon speech that matters. U.S.C.A.Const. Amend. 1.

4. Constitutional Law (Key) 82(6)

Corporate activities can clearly come within the First Amendment. U.S.C.A.Const. Amend. 1.

5. Constitutional Law (Key) 30.1(6)

Entertainment as well as news enjoys First Amendment protection. U.S.C.A.Const. Amend. 1.

6. Constitutional Law (Key) 90.1(6)

Motion pictures are covered by the First Amendment; indeed, a film carries with it a presumption of First Amendment protection. U.S.C.A.Const. Amend. 1.

7. Constitutional Law (Key) 90.1(4)

A statutory scheme which authorized closing for one year any establishment adjudged to be a nuisance unless the operator posted a penal bond against future violations of nuisance laws would be patently unconstitutional insofar as it was construed to allow the state to close, for one year, an establishment that had exhibited obscene films or sold obscene printed matter. U.S.C.A.Const. Amend. 1; Vernon's Ann.Tex.Civ.St. arts. 4664, 4666.

8. Constitutional Law (Key) 90(1)

A prior restraint of expression comes before the court with a heavy presumption against its constitutional validity. U.S.C.A.Const. Amend. 1.

9. Constitutional Law (Key) 90.1(1)

The line between obscenity and protected speech is thin and uncertain. U.S.C.A.Const. Amend. 1.

10. Constitutional Law (Key) 90.1(6)

It would constitute an impermissible prior restraint for the State of Texas to utilize its nuisance statutes to close for one year any theater that had exhibited obscene films. U.S.C.A.Const. Amend. 1; Vernon's Ann.Tex.Civ.St. arts. 4664, 4666.

11. Constitutional Law (Key) 46(1)

Federal courts should refrain from pasing on a constitutional question if there is an alternative ground such as statutory construction upon which the case may be decided.

12. Nuisance (Key) 60

The Texas statute which provides for suits to enjoin a nuisance and which states that if an establishment is found to be a nuisance, judgment shall be rendered abating the nuisance and ordering that the nuisance be closed for one year from the date of the judgment, unless the defendants post a penal bond, was inapplicable to obscenity. Vernon's Ann.Tex.Civ.St. art. 4666; U.S.C.A. Const. Amend. 1.

13. Intoxicating Liquors (Key) 259
Nuisance (Key) 60

The one-year abatement procedure available under Texas nuisance statute may be constitutionally applied in cases of gambling, prostitution and liquor law violations; however, the one year abatement procedure cannot be

constitutionally applied in cases of obscenity, bull fighting and live sex shows, which are covered only by any independent provision which defines certain activities as public nuisances. Vernon's Ann.Tex.Civ.St. arts. 4666, 4667; U.S.C.A.Const. Amend. 1.

14. Injunction (Key) 204

Wholly apart from First Amendment considerations, an injunction prohibiting the future showing of various unnamed "obscene" films would be invalid under the Texas Rules of Civil Procedure, which require that an injunctive order be specific in terms and describe in reasonable detail the act or acts sought to be restrained. Vernon's Ann.Tex. Civ.St. art. 4667(a)(3); U.S.C.A.Const. Amend. 1; Rules of Civil Procedure Tex. rule 683.

15. Injunction (Key) 204

Under Texas law, an injunction decree must be as definite, clear and precise as possible and, when practicable, it should inform the defendant of the acts he is restrained from doing without calling on him to make inferences or conclusions about which persons might well differ. Rules of Civil Procedure Tex. rule 683.

16. Constitutional Law (Key) 82(3)

Injunctions that abridge conduct protected by the First Amendment are constitutionally impermissible. U.S.C.A. Const. Amend. 1.

17. Constitutional Law (Key) 90.1(1)

Obscenity is not protected speech. U.S.C.A.Const. Amend. 1.

18. Constitutional Law (Key) 90.1(6)
Nuisance (Key) 60

The Texas statute which defines the use of any premises for the commercial manufacturing, distribution or exhibition of obscene material as a public nuisance subject to injunction at the suit of either the state or any citizen was unconstitutional insofar as it authorized injunctions against the future exhibition of unnamed films; such a broad injunction would amount to a prior restraint on materials not yet declared obscene. Vernon's Ann.Tex. Civ.St. art. 4667(a)(3); U.S.C.A.Const. Amend. 1.

19. Constitutional Law (Key) 90.1(1)
Nuisance (Key) 60

The Texas statute which defines the use of any premises for the commercial manufacturing, distribution or exhibition of obscene material as a public nuisance subject to injunction at the suit of either the state or any citizen was constitutionally infirm by reason of its failure to provide mandated procedural safeguards including a provision for a prompt and final judicial determination on the merits. Vernon's Ann.Tex.Civ.St. art. 4667(a)(3); U.S.C.A.Const. Amend. 1.

20. Constitutional Law (Key) 48(3)

Federal court can construe two state statutes as exclusive of one another in order to avoid a constitutional difficulty.

21. Constitutional Law (Key) 70.1(2)

Federal court cannot judicially rewrite Texas statutes and rules in order to incorporate mandatory constitutional safeguards against First Amendment violations. U.S.C.A. Const. Amend. 1.

22. Civil Rights (Key) 13.17

Attorney fees are permissible in a civil rights suit alleging violations of First Amendment rights. U.S.C.A. Const. Amend. 1; 42 U.S.C.A. §§ 1981-1986, 1988.

23. Federal Civil Procedure (Key) 2743

Court of Appeals has discretion to award costs and fees arising out of an appeal.

24. Civil Rights (Key) 13.17

Although Court of Appeals had discretion to award costs and fees arising out of an appeal, it was appropriate for district court to determine total award to be made to prevailing party in suit under the Civil Rights Act where the district court had reached its decision on the merits prior to the effective date of the 1976 amendment providing for such an award. 42 U.S.C.A. §§ 1981-1986, 1988; U.S.C.A.Const. Amend. 1.

Max P. Flusche, Jr., Asst. Atty. Gen., John L. Hill, Atty. Gen., David M. Kendall, 1st Asst. Atty. Gen., Joe B. Dibrell, Lonny F. Zwiener, Asst. Attys. Gen., Austin, Tex., for State of Texas.

Douglas C. Young, Keith W. Burris, Asst. Crim. Dist. Atty., San Antonio, Tex., for Butler.

Edgar Pfeil, Asst. City Atty., Jane Haun Macon, City Atty., San Antonio, Tex., for Peters.

Steven Arronge, San Antonio, Tex., for appellant.

Frierson M. Graves, Jr., Memphis, Tenn., Gerald Goldstein, San Antonio, Tex., for R. C. Dexter & Southland.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.*

THORNBERRY, Circuit Judge:

This Texas obscenity case has had a long and somewhat unusual history. Originally filed on November 12, 1973, in the Northern District of Texas under the caption *King Arts Theatre, Inc.* v. *McCrea,* it was subsequently consolidated by the Chief Judge of this Court with other obscenity cases pending before a three-judge court sitting in the Southern District of Texas. That court had initially been constituted to hear a single case, *Universal Amusement Co.* v. *Vance,* the caption of which graces this opinion.

The consolidated cases eventually mushroomed to twenty, and the three-judge court selected for trial three representative cases: *King Arts Theatre, Inc.* v. *McCrea, Dexter* v. *Butler,* and *Ellwest Stereo Theatre, Inc.* v. *Byrd.* The district court's opinion is reported under the caption *Universal Amusement Co.* v. *Vance,* 404 F.Supp. 33 (S.D. Tex. 1975). A panel of this Court affirmed the district court's decision in *Dexter* but reversed its ruling in *King Arts Universal Amusement Co.* v. *Vance,* 559 F.2d 1286 (5 Cir. 1977). The *Ellwest Stereo* case was not appealed.

This court ordered the two cases reheard *en banc* and subsequently severed and renumbered them, although both will continue to carry the *Universal Amusement* caption. This opinion thus treats only the appeal in *King Arts,*

*Judge Morgan was a member of the enbanc court under 28 U.S.C.A. § 46(c) and participated in the oral argument of the case en banc. Subsequently, the Omnibus Judgeship Bill, Public Law 95-486 (95th Congress), 92 Stat. 1629 was approved October 20, 1978. In view of this Judge Morgan does not participate in this decision.

No. 75-4312,[1] and for the reasons stated below, we reverse the panel and affirm the judgment of the district court.

The facts can be briefly summarized. In 1973, King Arts Theatre, Inc. was operating an indoor, adults-only motion picture theatre in San Angelo, Texas, that showed sexually explicit films. On October 30 of that year, the landlord from whom the theater building was rented gave notice to King Arts that its lease was to be terminated as of November 15. According to the notice, County Attorney George E. McCrea had informed the landlord that he intended to obtain an injunction to abate the theater as a public nuisance in order to prohibit the future showing of allegedly obscene motion pictures.

King Arts filed suit on November 12 in the Northern District of Texas seeking injunctive and declaratory relief from any action by the county attorney under the Texas nuisance statutes.[2] The case was then transferred to the three-judge court, and the parties agreed to maintain the status quo until the case could be decided. The district court found that the landlord was terminating King Arts' lease "at the suggestion" of the county attorney, and that he intended to seek an injunction based on the nuisance statutes and to pursue cancellation of the lease.[3]

1. The *Dexter* case was renumbered at 75-4313, and the decision of the *en banc* Court is reported at ____ F.2d ____ (5 Cir. 1978).

2. Jurisdiction was based on 28 U.S.C. § 1343, the jurisdictional counterpart to 42 U.S.C. § 1983, as well as on 28 U.S.C. § 2201 (declaratory judgments).

3. As the panel opinion pointed out, nothing in the landlord's notice letter to King Arts indicates that the lease termination was at the suggestion of McCrea; rather, the letter stated that the termination was to avoid the embarrassment and inconvenience of joinder as a defendant in a suit to enjoin the showing of pornographic films. 559 F.2d at 1289 n.2. However, the district court's opinion states that the facts recited therein were "agreed to by the parties," 404 F.Supp. at 38, and neither party challenges the district court's factual findings on appeal.

The district court concluded that *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), did not preclude granting the requested relief since no prosecution—either civil or criminal—was pending. It also found that a proceeding under the nuisance statutes would not cause irreparable injury and, accordingly, declined to grant injunctive relief. Reaching the merits of King Arts' claims, the court held that Texas courts would construe the phrase "obscene material" in the applicable Texas nuisance statute as the phrase was defined in the state's penal code and upheld that definition against a claim of unconstitutional vagueness. However, the court held that the Texas nuisance statutes, construed together, constituted an unconstitutional prior restraint on the distribution of materials not yet judicially determined to be obscene. In addition, the court expressed serious doubts about the validity of the Texas injunction procedures as applied in the obscenity context.

[1] The state of Texas[4] appealed from the district court's judgment that the nuisance statutes were unconstitutional. King Arts did not appeal from the court's denial of injunctive relief or its upholding of the state's obscenity definition. Because this is an appeal from the grant of declaratory relief alone, the Supreme Court is without jurisdiction to hear a direct appeal under 28 U.S.C. § 1253, and the appeal is properly before this Court. *Gerstein* v. *Coe*, 417 U.S. 279, 94 S.Ct. 2246, 41 L.Ed.2d 68 (1974); *Beal* v. *Doe*, 432 U.S. 438, 443, 97 S.Ct. 2366, 53 L.Ed.2d 464 n.5 (1977).[5]

4. In addition to County Attorney McCrea, the suit named as defendants Texas Governor Dolph Briscoe and Atorney General John Hill.

5. Under § 1253, any party may directly appeal to the Supreme Court from an order granting or denying an injunction in

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I.

[2-6] The only issue on appeal[6] is the constitutionality of the Texas nuisance statutes as applied to obscenity, although this question requires three separate but related inquiries. At the outset, we stress that while obscenity is not within the purview of the first amendment, *Roth* v. *United States*, 354 U.S. 476, 485, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), state regulation must not be permitted to impinge upon "speech that matters." Justice Brennan eloquently expressed this important concept in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963):

> [T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards is therefore but a spe-

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any civil action required to be heard by a three-judge court. Former § 2281, now repealed, provided that any injunction restraining the enforcement of a state statute or restraining a state official from enforcing such statute "shall not be granted . . . upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges." Because this action had been commenced before the effective date of the repealing legislation, § 2281 applied to this suit. Pub.L. 94-381, § 7; 94th Cong., 2d Sess. (1976) U.S.Code Cong. & Admin.News 1976, p. 1988.

6. Appellant did not raise the question of *Younger* abstention, and that issue, being nonjurisdictional, is thus not before this court. We note that in the instant case, there were no state proceedings pending when the suit was brought. *See Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

cial instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.

"[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools."

Id., at 66, 83 S.Ct. at 637 [citations and internal quotations omitted].[7]

[7] Our initial concern is whether the Texas statutory scheme operates as an unconstitutional prior restraint by allowing the state to close, for one year, an establishment that has exhibited obscene films or sold obscene printed matter. Although the instant case involves motion pictures, our analysis is equally applicable to printed material.

Article 4666 of the Texas Revised Civil Statutes[8] provides for suits in the name of the state to enjoin a nuisance.

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7. We also note other principles common to our three inquiries in this case. Corporate activities can clearly come within the first amendment. *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), and entertainment, as well as news, enjoys first amendment protection. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). Motion pictures are covered by the first amendment, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), and precision of regulation must be the touchstone. *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 682, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968). A film carries with it a presumption of first amendment protection, *Roaden* v. *Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), and the courts "must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller* v. *California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973).

8. Tex.Rev.Civ.Stat.Ann. art. 4666 provides:

Whenever the Attorney General, or the district or county attorney has reliable information that such a nuisance

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If an establishment is deemed a nuisance, there exists the rather Draconian remedy of closing the establishment "for one year from the date of said judgment," unless the operator posts a penal bond ranging from $1,000 to $5,000 against future violations of the nuisance laws. Article 4664[9] defines three types of establishments as "common nuisances," and the proprietor of such an establishment is guilty of "maintaining a nuisance": gambling houses, houses of prostitution, and places where intoxicating liquors are illegally kept, manufactured, sold, or given away.[10]

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exists, either of them shall file suit in the name of this State in the county where the nuisance is alleged to exist against whoever maintains such nuisance to abate and enjoin the same. If judgment be in favor of the State, then judgment shall be rendered abating said nuisance and enjoining the defendants from maintaining the same, and ordering that said house be closed for one year from the date of said judgment, unless the defendants in said suit, or the owner, tenant or lessee of said property make bond payable to the State at the county seat of the county where such nuisance is alleged to exist, in the penal sum of not less than one thousand nor more than five thousand dollars, with sufficient sureties to be approved by the judge trying the case, conditioned that the acts prohibited in this law shall not be done or permitted to be done in said house. On violation of any condition of such bond, the whole sum may be recovered as a penalty in the name and for the State in the county where such conditions are violated, all such suits to be brought by the district or county attorney of such county.

9. Tex.Rev.Civ.Stat.Ann. art. 4664 provides:

Any hotel, rooming house or boarding house, country club, garage, rent car stand or other place to which the public commonly resort for board or lodging or commonly congregate for business or pleasure, where intoxicating liquors are kept, possessed, sold, manufactured, bartered or given way, or where intoxicating liquors are furnished to minors or to students of any educational institution, or where persons habitually resort for the purpose of prostitution or to gamble as prohibited by the Penal Code, is hereby declared to be a common nuisance. Any person who knowingly maintains such a place is guilty of maintaining a nuisance.

10. The liquor provision has been construed as referring to places where liquor law violations occur. *See State* v. *Parker*, 147 Tex. 57, 212 S.W.2d 132 (1948).

Article 4667[11] defines the commercial manufacture, distribution, or exhibition of obscene material as a "public nuisance" and also sets forth a list of other nuisances, including gambling, prostitution, and bull fighting. The statute further provides that such activities "shall be enjoined at the suit of either the State or any citizen thereof."

The Texas courts have not examined the relationship between Articles 4666 and 4667. *Compare State ex rel. Ewing* v. *"Without a Stitch,"* 37 Ohio St.2d 95, 307 N.E.2d 911, 917-18 (1974), *app. dism'd,* 421 U.S. 923, 95 S.Ct. 1649,

11. Tex.Rev.Stat.Ann. art. 4667 provides:

(a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:

(1) For gambling, gambling promotion, or communicating gambling information prohibited by law;

(2) For the promotion or aggravated promotion of prostitution, or compelling prostitution;

(3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;

(4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse;

(5) For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by law.

(b) Any person who may use or be about to use, or who may be a party to the use of any such premises for any purpose mentioned in this Article may be made a party defendant in such suit. The Attorney General or any District or County Attorney or City Attorney may bring and prosecute all suits that either may deem necessary to enjoin such uses, and need not verify the petition; or any citizen of this State may sue in his own name and shall not be required to show that he is personally injured by the acts complained of.

Prior to its amendment in 1973, Article 4667 did not denominate its various injunction-worthy activities as nuisances. The 1973 amendment, which brought commercial obscenity within the statute, also added the term "nuisance."

44 L.Ed.2d 82 (1975) (interpreting one-year closing provision of state nuisance statute). The plain language of the statutes suggests that obscenity, which is defined as a nuisance under Art. 4667, is thus subject to the one-year closing provisions of Art. 4666. So read, the statutes would be patently unconstitutional insofar as they pertain to obscenity.

[8, 9] A prior restraint of expression comes before this court with "a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan, supra* 372 U.S. at 70, 83 S.Ct. at p. 639; *New York Times Co.* v. *United States,* 403 U.S. 713, 714, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). Read together, Articles 4666 and 4667 clearly create a prior restraint. The statutes allow the state to close, for one year, a theatre that has exhibited obscene films. Unless a bond from $1,000 to $5,000 is posted, the showing of *any* motion picture is punishable by contempt of court. Thus, future conduct that may fall within the purview of the first amendment is absolutely prohibited after a finding of unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in the landmark case of *Near* v. *Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Moreover, although a theater operator may post the bond and show films, he forfeits that bond if one of the films he has selected is deemed obscene. This statutory scheme obviously encourages a theater operator to steer wide of the danger zone by avoiding borderline films that are nonetheless protected under the first amendment. The line between obscenity and protected speech is "dim and uncertain," *Bantam Books, Inc.* v. *Sullivan, supra* 372 U.S. at 66,[12]

12. As Justice Brennan has observed:

The essence of our problem in the obscenity area is that we have been unable to provide "sensitive tools" to separate obscenity from other sexually oriented but constitutionally

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83 S.Ct. 631, and difficulty in locating that line leads to self-censorship, a particularly subtle and most insidious form of the malady. *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (defamation).

[10] Application of the one-year closing provisions in obscenity cases under the Texas nuisance statutes would constitute an impermissible prior restraint, since the state would be "enjoin[ing] the future operation of a [business] which disseminates presumptively First Amendment protected materials solely on the basis of the nature of the materials which were sold . . . in the past." *Speight* v. *Slaton*, 356 F.Supp. 1101, 1107 (N.D.Ga.1973) (Morgan, J., dissenting), *vacated and remanded*, 415 U.S. 333, 94 S.Ct. 1098, 39 L.Ed.2d 367 (1974). Many courts have so held.[13]

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protected speech, so that efforts to suppress the former do not spill over into suppression of the latter.

Paris Adult Theatre I v. *Slaton*, 412 U.S. 49, 79-80, 93 S.Ct. 2628, 2645, 37 L.Ed.2d 446 (1973) (Brennan, J., dissenting). *See also Ginzburg* v. *United States*, 383 U.S. 463, 480-81, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966) (Black, J., dissenting).

13. *E. g., Sanders* v. *State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *Gulf States Theatres of Louisiana, Inc.* v. *Richardson*, 287 So.2d 480 (La. 1974); *General Corp.* v. *State ex rel. Sweeton*, 294 Ala. 657, 320 So.2d 668 (1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1494, 47 L.Ed.2d 753 (1976); *Mitchem* v. *State ex rel. Schaub*, 250 So.2d 883 (Fla. 1971); *People ex rel. Busch* v. *Projection Room Theatre*, 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600, *cert. denied*, 429 U.S. 922, 97 S.Ct. 320, 50 L.Ed.2d 289 (1976); *New Riviera Arts Theatre* v. *State ex rel. Davis*, 219 Tenn. 652, 412 S.W.2d 890 (1967); *State ex rel. Blee* v. *Mohney Enterprises*, 154 Ind. App. 244, 289 N.E.2d 519 (1973); *State ex rel. Field* v. *Hess*, 540 P.2d 1165 (Okl.1975); *State* v. *A Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976); *State ex rel. Ewing* v. *"Without a Stitch," supra; Spokane Arcades* v. *Ray*, 449 F.Supp. 1145 (E.D.Wash.1978). *See generally* Edelstein & Mott, *Collateral Problems in Obscenity Regulation: A Uniform Approach to Prior Restraints, Community Standards, and Judgment Preclusion*, 7 Seton Hall L.Rev. 543 (1976); Hogue, *Regulating Obscenity Through the Power to Define and Abate Nuisances*, 14 Wake Forest L.Rev. 1 (1978); Rendleman, *Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute*, 44 U.Chi. L.Rev. 509 (1977).

[11-13] However, the federal courts should refrain from passing upon a constitutional question if there is an alternative ground such as statutory construction upon which the case may be decided. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); *Pugh* v. *Rainwater*, 572 F.2d 1053, 1058 (5 Cir. 1978) (en banc). Accordingly, we hold that the one-year closing remedy provided in Article 4666 is inapplicable to obscenity and that the injunctive remedy provided in Article 4667 is the exclusive procedure for abating obscene exhibitions as nuisances. Thus, the one-year abatement procedure can be applied in cases of gambling, prostitution, and liquor law violations, all of which are defined as nuisances in Article 4664, but not in cases of obscenity, bull fighting, and live sex shows, which are covered only by Article 4667. This reading of the statutes, while somewhat strained,[14] is not implausible, given the fact that Articles 4664-66 were enacted in one bill, prior to enactment of Article 4667, and that Article 4667 did not contain the term "nuisance" until its amendment in 1973. *See* 559 F.2d at 1291 (panel opinion).

II.

King Arts also urges that the injunction permitted by Article 4667(a)(3) is constitutionally deficient because the state can obtain an injunction that prohibits the future showing of various unnamed "obscene" films. The district

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14. We could, for example, speculate that the legislature treated obscenity only in Article 4667 because it recognized the first amendment implications of a one-year closing under Article 4666. However, if that is so, it is rather odd that the legislature chose to include live sex shows and bull fighting in the same statute as obscenity, since those two activities implicate the first amendment only in the barest fashion. *Cf. California* v. *LaRue*, 409 U.S. 109, 118, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972). We note that our efforts at statutory interpretation are handicapped by the lack of a legislative history of the nuisance statutes.

court hinted its agreement but did not discuss the matter at length in view of its disposition of the case. The panel, however, determined that the injunctive procedure was "basically sound." 559 F.2d at 1292.[15]

[14, 15] Wholly apart from first amendment considerations, such a broadly drawn injunction would be invalid under the Texas Rules of Civil Procedure, which require that the injunctive order "be specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained . . . ." Rule 683, Tex.R.Civ.P. As the Texas Supreme Court explained in *Villalabos* v. *Holquin*, 146 Tex. 474, 208 S.W.2d 871, 875 (1948):

> [A]n injunction decree must be as definite, clear and precise as possible, and when practicable it should inform the defendant of the acts he is restrained from doing, without calling on him for inferences or conclusions about which persons might well differ and without leaving anything for further hearing.

See also Ex parte Slavin, 412 S.W.2d 43 (Tex.1967).

For example, in *Moore* v. *State*, 470 S.W.2d 391 (Tex. Civ.App.—San Antonio 1971, writ ref. n. r. e.), the trial court had granted a temporary injunction prohibiting the sale of certain specific magazines and books, as well as the sale of "similar" material. In holding the "similar material" portion of the injunction invalid under Rule 683, the court said:

> [The order] does not sufficiently appraise [sic] appellants of the acts they are restrained from doing. In effect, the court is passing upon the obscenity of books, magazines, newspapers and films not before it, and perhaps not now in existence; and it prohibits generally the defendants from violating a penal statute without clear, precise or definite guidelines.

15. King Arts did not cross-appeal in this case, but it need not have done so in order to urge alternative theories in support of the district court's judgment that Article 4667(a)(3) is unconstitutional. *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924); *Lowe* v. *Pate Stevedoring Co.*, 558 F.2d 769, 770-71 n.2 (5 Cir. 1977).

470 S.W.2d at 396. Moreover, in *Richards* v. *State*, 497 S.W.2d 770 (Tex.Civ.App.—Beaumont 1973, no writ), the court was faced with an injunction prohibiting, *inter alia* the exhibition and distribution of obscene material in violation of the Texas Penal Code. Relying on *Moore*, the court held this portion of the injunction invalid under Rule 683: "This facet of the decree does not even comport with our basic rules of civil procedure, much less the almost insurmountable obstacle of the First Amendment." 497 S.W.2d at 778.

However, the *Richards* decision indicates that the Texas courts are willing to uphold more specifically framed injunctions against unnamed future films or publications. Another portion of the injunction in *Richards* prohibited the defendants from "exhibiting or selling any other films which show actual acts of fellatio . . ., cunnilingus . . ., actual oral genital contact between two or more males or females, any sexual intercourse between any human and any animal or any scenes depicting actual sexual intercourse between human males and females." The court, while recognizing the first amendment problems, upheld this part of the injunction as being "specific, definite, and clear." 497 S.W.2d at 780.[16]

16. The court modified the decree to incorporate the holding of *Miller* v. *California*, *supra*:

> The injunction granted by this paragraph of the order is limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have any serious literary, artistic, political, or scientific value."

497 S.W.2d at 782.

Similarly, in *Locke* v. *State*, 516 S.W.2d 949 (Tex. Civ.App.—Texarkana 1974, no writ), the trial court had issued a temporary injunction enjoining appellant from commercially exhibiting films portraying acts of sexual intercourse, deviate sexual intercourse, and bestiality as defined by Texas Penal Code §§ 21.01, 21.07. The court upheld the injunction, concluding that it was not impermissibly vague and was not a prior restraint. The court said:

> The order in question here restrains only the exhibition of films depicting specific activities conducted in a certain manner. All these activities are expressly defined by statute and have been authoritatively construed to constitute obscenity not entitled to constitutional protection. The order does not contain a blanket suppression of films vaguely labeled "obscene," and there is no suppression of films by name or any other designation except by reference to the specific conduct depicted therein.

516 S.W.2d at 954-55 [citations omitted].[17]

It thus appears that Rule 683, as interpreted by the Texas courts, would allow the issuance of an injunction against the future exhibition of unnamed films that depict particular acts enumerated in the state's obscenity statute.[18]

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17. The court also stressed the existence in the order of an agreed procedure by which appellant could secure a judicial determination of a film's status prior to its exhibition. This procedure, the court said, "is designed to prevent constitutionally protected material from being suppressed." 516 S.W.2d at 955.

18. Tex. Penal Code § 43.21 (Supp.1978) provides, in pertinent part:

(1) "Obscene" means having as a whole a dominant theme that:

(A) appeals to the prurient interest of the average person applying contemporary community standards;

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That is, while an injunction cannot simply forbid the showing of "obscene films," it can prohibit the showing of films that fall within the statutory definition of obscenity, so long as the prohibited acts are spelled out in the injunction. If this is the case—and the *Richards* and *Locke* decisions apparently represent the current state of the law—then we must examine such an injunction in light of the first amendment.

[16, 17] Injunctions that abridge conduct protected by the first amendment are constitutionally impermissible. *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971); *United Transp. Union* v. *State Bar*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971). Although obscenity is not protected speech, "[t]he line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling

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(B) depicts or describes sexual conduct in a patently offensive way; and

(C) lacks serious literary, artistic, politcal, or scientific value.

* * *

(3) "Prurient interest" means an interest in sexual conduct that goes substantially beyond customary limits of candor in description or representation of such conduct. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

* * *

(6) "Sexual conduct" means:

(A) any contact between any part of the genitals of one person and the mouth or anus of another person;

(B) any contact between the female sex organ and the male sex organ;

(C) any contact between a person's mouth or genitals and the anus or genitals of an animal or fowl; or

(D) patently offensive representations of masturbation or excretory functions.

censorship are formidable." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559, 95 S.Ct. 1239, 1247, 43 L.Ed.2d 448 (1975). Accordingly, the Supreme Court has recognized the validity of injunctions against obscenity only when various safeguards are employed. For example, in *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 445, 77 S.Ct. 1325, 1330, 1 L.Ed.2d 1469 (1957), the Court upheld a New York statute, which, as authoritatively construed, "studiously withholds restraint upon matters not already published and not yet found to be offensive." Similarly, in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 55, 93 S.Ct. 2628, 2634, 37 L.Ed.2d 446 (1973), the Court emphasized that a Georgia statute imposed no restraint on the exhibition of films "until after a full adversay proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected." No such safeguards exist under Texas law. *See, e. g., Richards* v. *State, supra.*[19]

An order banning the exhibition of unnamed "obscene" films would prohibit the showing of films that have not been judicially declared obscene, as well as films that may not have even been produced. Such a blanket ban is not rendered unobjectionable by the interweaving of threats of language from obscenity statutes, for the end result is a sweeping prohibition against the screening of obscene films in general. Incorporation of the statutory definition of obscenity—usually a listing of forbidden sexual acts or acrobatics—merely begs the question, for few of us have the omniscience to determine, in advance of a final judicial ruling, whether a film is legally obscene. Moreover, it is possible that a film containing many of the acts listed in the statute may eventually be held *not*

19. Although some safeguards may apparently be written into an injunction, *see Locke* v. *State, supra* at 995 (discussed at footnote 17, *supra*), there is no *requirement* that they be included.

to be obscene, since the work must be taken as a whole, *Miller* v. *California, supra*, and since state law cannot define the "contemporary community standards" that must be applied by the fact finder. *Smith* v. *United States*, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977). An injunction that forbids the showing of any film portraying the particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive. As Chief Justice Hughes wrote in *Near* v. *Minnesota, supra* 283 U.S. at 713, 51 S.Ct. at 630, "[t]his is of the essence of censorship."

[18] We therefore hold that Article 4667(a)(3) is unconstitutional insofar as it authorizes injunctions against the future exhibition of unnamed films. Such a broad injunction simply cannot stand, for it amounts to a prior restraint on materials not yet declared obscene. *Parish of Jefferson* v. *Bayou Landing, Ltd.*, 350 So.2d 158 (La. 1977); *News Mart, Inc.* v. *State ex rel. Webster*, 561 S.W. 2d 752 (Tenn.1978); *Ranck* v. *Bonal Enterprises, Inc.*, 467 Pa. 569, 359 A.2d 748 (Pa.1976); *Fehlhaber* v. *North Carolina*, 445 F.Supp. 130 (E.D.N.C.1978); *Mitchem* v. *State ex rel. Schaub, supra; State ex rel. Field* v. *Hess, supra; New Riviera Arts Theatre* v. *State ex rel. Davis, supra; Busch* v. *Projection Room Theatre, supra.*

III.

[19] King Arts also contends that Article 4667(a)(3) lacks the procedural safeguards required under *Freedman* v. *Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).[20] Those safeguards were recently affirmed in

20. The district court expressed serious doubts about the validity of the Texas injunction procedure in the obscenity context but did not make a specific ruling in light of its disposition of the case. 404 F.Supp. at 45-46. The panel, however, upheld the procedures as constitutional. 559 F.2d at 1292-93.

Southeastern Promotions, Ltd. v. *Conrad, supra* in which the Court summarized them as follows:

> *First,* the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second,* any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third,* a prompt final judicial determination must be assured.

420 U.S. at 560, 95 S.Ct. at 1247 [italics in original]. *See also United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 44 (1971); *Blount* v. *Rizzi,* 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971); *Teitel Film Corp.* v. *Cusack,* 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966 (1971).

Although *Freedman* arose in the context of obscenity determinations made by administrative bodies such as licensing boards or film commissions, its principles clearly extend to state statutes and rules governing injunctions against obscenity. *McKinney* v. *Alabama,* 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976); *Paris Adult Theatre I* v. *Slaton, supra*; *Grove Press, Inc.* v. *Philadelphia,* 418 F.2d 82 (3 Cir. 1969); *United Artists Corp.* v. *Wright,* 368 F.Supp. 1034 (M.D.Ala.1974) (Three-judge court); *Gundlach* v. *Rauhauser,* 304 F.Supp. 962 (M.D.Pa.1969) (three-judge court).

Under the Texas injunction procedure, the trial court has broad discretion to grant or deny a temporary injunction, the purpose of which is to preserve the status quo of the suit's subject matter pending a final trial of the case on its merits. Accordingly, the trial court's decision is not a ruling on the merits of the case, but rather a determination of whether the applicant has shown a "probable right" and a "probable injury." In carrying this burden, the applicant is not required to establish that he will finally prevail in the litigation. The judgment of the trial court will be upheld unless the appellate court is convinced there was a clear abuse of discretion, and there is no such abuse if the evidence "tends" to sustain the cause of action as alleged. *State* v. *Southwestern Bell Tel. Co.,* 526 S.W.2d 526 (Tex.1975); *Oil Field Haulers Ass'n* v. *Railroad Comm'n,* 381 S.W.2d 183 (Tex.1964); *Janus Films, Inc.* v. *City of Fort Worth,* 163 Tex. 616, 358 S.W.2d 589 (1962); *Transport Co. of Texas* v. *Robertson Transports, Inc.,* 152 Tex. 551, 261 S.W.2d 549 (1953); *Texas Foundries, Inc.* v. *Foundry Workers,* 151 Tex. 239, 248 S.W.2d 460 (1952); *Southwestern Greyhound Lines* v. *Railroad Comm'n,* 128 Tex. 560, 99 S.W.2d 263 (Tex. 1936); *Hickman* v. *Board of Regents,* 552 S.W.2d 616 (Tex. Civ.App.—Austin 1977, writ ref'd).[21]

It is also clear that a party is not to receive full relief at a hearing for a temporary injunction, since the burden at that stage—"probable right" and "probable injury" —is substantially different from that at a final hearing on the merits. *Houston Belt & Terminal Ry. Co.* v. *Texas & N.O. R.R. Co.,* 155 Tex. 407, 289 S.W.2d 217 (1956);

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21. By way of comparison, this court has held that a federal district court, in order to grant a preliminary injunction, must find that the moving party has satisfied four prerequisites: (1) substantial likelihood of success on the merits; (2) a showing of irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest. The movant has the heavy burden of persuading the district court that all four elements are satisfied, and this court will overturn the district court's decision only for abuse of discretion. *E. g., Hardin* v. *Houston Chronicle Pub. Co.,* 572 F.2d 1106 (5 Cir. 1978); *Canal Authority* v. *Callaway,* 489 F.2d 567 (5 Cir. 1974).

North East I.S.D. v. *North East Federation of Teachers,* 541 S.W.2d 191 (Tex.Civ.App.—El Paso 1976, no writ).

Pursuant to Rules 680-693a of the Texas Rules of Civil Procedure, the state can obtain, ex parte, a 10-day temporary restraining order against the showing of an allegedly obscene film. As soon as possible within the 10-day period, a hearing on a temporary injunction is obtainable. As the cases cited above make clear, this hearing is not a final adjudication on the merits, and, accordingly, the issuance of a temporary injunction is not a final judicial determination of obscenity. Rather, the granting of such an injunction represents the trial court's determination that the applicant has shown a "probable right" and a "probable injury" and has presented evidence that "tends" to sustain his cause of action. On appeal from the temporary injunction, the theater operator who has been enjoined cannot argue that the suppressed film is not obscene. Rather, "[t]he action under appellate review . . . is the exercise by the trial court of the discretionary power [to issue the injunction] pending trial, thereby maintaining the status quo." *State* v. *Southwestern Bell Tel Co., supra* at 528.[22]

Under the Texas procedure, the obscenity case is treated no differently than any other civil case. Thus, if the theater operator is unable to convince an appellate court that the trial court abused its discretion in granting the temporary injunction, the order remains in effect and the film—which is presumably protected under the first

22. We note that the Texas procedure does not provide a mechanism for the issuance of a "preservation order" enjoining a theater from disposing of the allegedly obscene film pending trial but not interfering with its continued exhibition. *Compare* N.C.Gen.Stat. § 14-190.2(d)(3); Tenn.Code Ann. § 39-3019. *See Paris Adult Theatre I* v. *Slaton, supra; Heller* v. *New York,* 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973).

amendment—remains suppressed pending a full-blown trial on the merits.[23] At such a trial, it is quite possible for the court to hold that the film is not obscene, *cf. Texas Foundries, Inc.* v. *Foundry Workers, supra* 261 S.W. 2d at 464; *Lloyd A. Fry Roofing Co.* v. *State,* 541 S.W.2d 639, 648 (Tex.Civ.App.—Dallas 1976, writ ref. n. r. e.), with the end result being that a film protected by the first amendment has been indefinitely suppressed before an on-the-merits judicial determination of obscenity. The Court recognized such a danger in *Freedman*: "the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous" preliminary restraint. 380 U.S. at 59, 85 S.Ct. at 739. Moreover, in *Southeastern Promotions* the Court, as in *Freedman* analyzing an administrative system, stressed that a final on-the-merits judicial determination was not immediately available. Justice Blackmun wrote:

> The board's system did not provide a procedure for prompt judicial review. Although the District Court commendably held a hearing on petitioner's motion for a preliminary injunction within a few days of the board's decision, it did not review the merits of the decision at that time. The question at the hearing

23. It is no answer to maintain that the theater operator could obtain a prompt, final judicial determination of obscenity by violating the injunction and thus bringing about contempt proceedings. *See* Tex.Rev.Civ.Stat.Ann. art. 1911a; Rule 692, Tex.R.Civ.P. Such a violation would constitute constructive criminal contempt, *Ex parte Werblud,* 536 S.W.2d 542 (Tex.1976), and the state would have the burden of proof beyond a reasonable doubt. Surely one is not required to risk criminal sanction in order to obtain what *Freedman* requires the state to provide. Under the contempt procedure, the burden of obtaining a prompt, final judicial determination of obscenity is impermissibly placed on the theater operator. Moreover, although the state has the burden of proving beyond a reasonable doubt that the theater operator is guilty of contempt, it is not clear whether the state also has the burden of proving that the film is obscene, as *Freedman* requires. *Cf. Railroad Comm'n* v. *Sample,* 405 S.W.2d 338, 343 (Tex.1966).

was whether petitioner should receive *preliminary* relief, i. e., whether there was a likelihood of success on the merits and whether petitioner would suffer irreparable injury pending full review. Effective review on the merits was not obtained until more than five months later. * * * During the time prior to judicial determination, the restraint altered the status quo.

420 U.S. at 561-62, 95 S.Ct. at 1248 [emphasis in original].

The identical situation is present under the Texas injunction procedure; the hearing on the temporary injunction does not constitute an on-the-merits determination of obscenity, and there is no provision for a prompt review on the merits. And, while such a temporary injunction is in effect, the status quo is obviously altered—rather than maintained—and presumably protected speech is indefinitely suppressed. It is difficult to improve upon the words of Judge Aldisert in *Grove Press, Inc.* v. *Philadelphia, supra*:

> The mischief we perceive . . . is that there is no guarantee a final hearing will be seasonably scheduled after the issuance of a preliminary injunction and that a prompt decision will be forthcoming thereafter. The preliminary restraint could exist days, and even months, before the judicial decision on the merits; where this possibility exists, an unacceptable threat to the freedom of expression without due process of law results.
>
> * * *
>
> Where expression is inhibited as a result of prompt judicial decision reached after an adversary proceeding, there can be no procedural due process complaint. But where the inhibition occurs in a preliminary proceeding, with no guarantee of a prompt judicial decision on the merits, the procedure is constitutionally defective because a restraint of presumably protected expression not only occurs but is capable of persisting for an unlimited time prior to the required judicial determination.

418 F.2d at 90.

Accordingly, we hold that Article 4667(a)(3), which authorizes injunctions in the obscenity context, is constitutionally infirm for its failure to provide the safeguards mandated by *Freedman*. In short, the Texas procedure does not treat obscenity with the kid gloves that the first amendment requires, for the state's process for ascertaining whether certain materials are obscene must ensure "the necessary sensitivity to freedom of expression." *Freedman* v. *Maryland, supra* 380 U.S. at 58, 85 S.Ct. at 739. *Compare* the New York procedure outlined in *Kingsley Books, Inc.* v. *Brown, supra,* which the *Freedman* Court described as a "model."[24]

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24. Texas once had a procedure by which obscenity injunctions were treated in a special fashion. Texas Penal Code of 1925, art. 527, § 13, *repealed,* Acts of 1973, 63d Legislature, ch. 399, § 3. This same legislation amended present Art. 4667 to include obscenity. Ch. 399, § 2(J). For judicial consideration of the former procedure, see *State* v. *Scott,* 460 S.W.2d 103 (Tex.1970), *cert. denied,* 402 U.S. 1012, 91 S.Ct. 2188, 29 L.Ed.2d 435 (1971); *Newman* v. *Conover,* 313 F.Supp. 623 (N.D.Tex.1970) (three-judge court); *Fontaine* v. *Dial,* 303 F.Supp. 436 (W.D.Tex.1969) (three-judge court).

The Pennsylvania injunction rules include the following provision:

> When a preliminary or special injunction involving freedom of expression is issued, either without notice or after notice and hearing, the court shall hold a final hearing within three (3) days after demand by the defendant. A final decree shall be filed . . . within twenty-four (24) hours after the close of the hearing. If the final hearing is not held within the three (3) day period, or if the final decree is not filed within twenty-four (24) hours after the close of the hearing, the injunction shall be deemed dissolved.

(*Continued on following page*)

[20, 21] Although this court can construe two state statutes to be exclusive of one another in order to avoid a constitutional difficulty, as we have done in Part I of this opinion, we cannot judicially rewrite the Texas statutes and rules to incorporate the *Freedman* safeguards. As the Supreme Court said in *Freedman* "[h]ow or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is for the state to decide." 380 U.S. at 60, 85 S.Ct. at 740. *Compare United States* v. *Thirty-Seven Photographs, supra* (federal statute). The task of complying with *Freedman* must therefore be left to the State of Texas.

IV.

[22] King Arts seeks a remand to the district court for a determination and award of costs and attorneys' fees. Under 42 U.S.C. § 1988, as amended in 1976, a "prevailing party" in an action brought under the Civil Rights Acts, 42 U.S.C. §§ 1981-86, may be awarded "a reasonable attorney's fee as part of the costs." The statute's constitutionality has been upheld. *Hutto* v. *Finney*, ... U.S. ....., 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Rainey* v. *Jackson State College*, 551 F.2d 672 (5 Cir. 1977). These decisions also make clear that § 1988 permits attorneys' fees in cases that were pending at the time of its enactment. The instant case falls into that category.[25]

Footnote continued—

Rule 1531(f)(1), Pa.R.Civ.P. An explanatory note states that the three-day period is a maximum and that "in particular cases, a shorter period may be required." For relevant judicial background, see *Grove Press, Inc.* v. *Philadelphia, supra; Duggan* v. *807 Liberty Ave., Inc.*, 447 Pa. 281, 288 A.2d 750 (Pa.1972); *Commonwealth* v. *Guild Theatre, Inc.*, 432 Pa. 378, 248 A.2d 45 (Pa. 1968).

25. As the panel opinion makes clear ,attorneys' fees are permissible in a civil rights suit alleging violations of first amendment rights. 559 F.2d at 1300-01. *See also Simpson* v. *Weeks*, 570 F.2d 240 (8 Cir. 1978); *Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114 (1 Cir. 1977).

[23, 24] Although this court has discretion to award costs and fees arising out of an appeal to this court, *Globe Life & Accident Ins. Co.* v. *Still*, 402 F.2d 295 (5 Cir. 1968), we think that the district court should determine the total award here, *see Panior* v. *Iberville Parish School Board*, 543 F.2d 1117, 1120 (5 Cir. 1976), especially since the district court reached its decision on the merits prior to the effective date of the 1976 amendment to § 1988. According, we remand the case to the managing judge of the district court with directions to set reasonable attorneys' fees in accordance with the standards established in *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5 Cir. 1974). The district court shall determine the necessity of holding an evidentiary hearing.

V.

The judgment of the district court holding unconstitutional Tex.Rev.Civ.Stat.Ann. art. 4667(a)(3) is AFFIRMED, and the case is REMANDED to the district court for the awarding of reasonable attorneys' fees to King Arts, the prevailing party.

SO ORDERED.

GEE, Circuit Judge, with whom BROWN, Chief Judge, COLEMAN, AINSWORTH, TJOFLAT and VANCE, Circuit Judges, join, dissenting:

I.

Of Draconian Remedies and Strained Constructions to Avoid Them

Part I of the majority opinion reaches the same result on about the same reasoning as the panel opinion, *see* 559 F.2d at 1290-92. I concur in it.

II.

Of Injunctions, Statutes and Prior Restraints

Part II of the majority opinion declares Texas Article 4667(a)(3) unconstitutional as authorizing injunctions against the future exhibition of unnamed obscene films. The Texas statutes defining obscenity are couched in the language of the Supreme Court's decision in *Miller* v. *California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and there is no contention that their standards or definitions are overbroad. Further, the Texas courts (as a matter of general procedural law) require in the obscenity context as elsewhere that injunctions be specific, clear and definite. In the example chosen by the majority, *Richads* v. *State,* 497 S.W.2d 770 (Tex.Civ.App.—Beaumont 1973, no writ hist.) the injunction prohibited "exhibiting or selling any other films which show actual acts of fellatio . . ., cunnilingus . . ., actual oral genital contact between two or more males or females, any sexual intercourse, between any human and any animal or any scenes depicting actual sexual intercourse, between human males and females." 497 S.W.2d at 772. Modifying the decree to incorporate the holding of *Miller* v. *California, supra,*[1] the Texas court upheld the injunction.

Thus the holding of the majority appears to be that any injunction, no matter how specific, that restrains the exhibition of films by definitions or categories rather than one-by-one and after the fact of a specific, prior adjudica-

1. "The injunction granted by this paragraph of the order is limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have any serious literary, artistic, political, or scientific value." 497 S.W.2d at 782.

tion of obscenity is invalid. To quote from the opinion (Maj. op. p. 169):

> "An injunction that forbids the showing of any film portraying the particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive. As Chief Justice Hughes wrote in *Near* v. *Minnesota, supra,* 283 U.S. 697, at 713, 51 S.Ct. 625, '[t]his is of the essence of censorship.' "

I think that there are serious flaws in this reasoning.

In the first place, the majority's statement is simply incorrect: an injunction against exhibiting a film depicting enumerated acts from the obscenity statute suppresses that film not at all "because past films have been deemed offensive" but because the present film depicts the acts in a manner forbidden by the statute.

In the second, the quotation from *Near* v. *Minnesota* is a characterization of an entirely different sort of act—the suppression of publication of future issues of a newspaper because earlier issues were deemed scandalous. The analog of such an act in the present context would be the closing of King Art's Theatre to exhibition of *any* film because it had exhibited obscene ones in the past. This would indeed be "of the essence of censorship," but it is a far cry from an injunction forbidding in specific terms the exhibition of such films only as violate the statute.

Indeed, the majority's reasoning on this head comes to little more than announcing that injunctions are prior restraints and prior restraints are bad. The suggestion that an injunction merely against obscene matter—admittedly unprotected by the first amendment—might be valid

is disposed of, as nearly as I can understand the opinion, by the observation that obscenity cannot be defined with sufficient precision to be the subject matter of a valid injunction. Unless this is what the sentence at Maj. op. p. 169 commencing "Incorporation of the statutory definition of obscenity . . . merely begs the question" means, then I do not know what it means. But this argument proves too much, for if the definition is too vague for an injunction, surely it must also be too vague to satisfy due process as giving fair notice of conduct subject to criminal penalties?

More, the argument is overbroad in another respect. It implies that no injunction in a first amendment context is valid, though we know this is not so. Indeed, as a practical matter, I can see little if any difference between an injunction against exhibiting obscene films (constitutionally defined) and a statute against doing so, and what difference there is favors the injunction. As Mr. Justice Frankfurter wrote for the Court in *Kingsley Books* v. *Brown*, 354 U.S. 436, 441-2, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957):

> "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 539.

> "Wherein does § 22-a differ in its effective operation from the type of statute upheld in Alberts? Section 311 of California's Penal Code provides that 'Every person who wilfully and lewdly . . . keeps for sale . . . any obscene . . . book . . . is guilty of a misdemeanor . . . .' Section 1141 of New York's Penal Law is similar. One would be bold to assert that the *in terrorem* effect of such statutes less restrains booksellers in the period before the law strikes than does § 22-a. Instead of requiring the bookseller to dread that the offer for sale of a book, may without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity. Until then, he may keep the book for sale and sell it on his own own judgment rather than steer 'nervously among the treacherous shoals.' "

Thus if a statute forbidding publication of obscenity can be constitutionally valid, it is hard for me to see how an injunction doing the same thing is per se invalid. Yet as nearly as I can understand the majority opinion, this is what Part II of it says.

III.

Of Kid Gloves and Obscenity

Part III of the court's opinion purports to invalidate Texas Article 4667(a)(3) on the additional ground that it "lacks the procedural safeguards required by *Freedman* v. *Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)" (Maj. op. p. 169) and hence fails to "treat obscenity with the kid gloves that the first amendment re-

quires, . . ." (Maj. op. p. 172). But since Article 4667(a)(3) does no more than in general terms authorize an injunction, thus implicitly referring to the basic Texas injunction procedures, it is in fact these latter which the opinion finds procedurally deficient when sought to be employed against obscenity. These procedures are patterned on the Federal ones, Texas Rules of Civil Procedure 680 and 681 which define them being copied from Federal Rule 65, with minor and insignificant textual changes. It is plain, therefore, that a necessary consequence of the majority opinion is to invalidate our Rule 65 procedures to the same extent as the Texas ones, an effect which practitioners in our courts should note. Thus we impliedly hold today that those who crafted and promulgated our own Federal system of injunctions overlooked providing a procedure valid for use in the obscenity context, a somewhat far-reaching and arresting conclusion.

The majority reaches this result by fixing on one word of the Supreme Court's language in two cases arising in a somewhat different context from this, court review of *administrative* censorship. With deference, it seems to me that the contexts are sufficiently dissimilar that the language in question need not and should not be applied here, where no administrator and no censor—only courts—figure in the matter anywhere. The two cases are *Freedman* v. *Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965) and *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); the word seized upon is the term "final."

In a nutshell, the majority holds that Texas (and hence Federal) injunction procedures are invalid as applied to obscenity because they do not require a "final" ruling on the merits of obscenity before preliminary injunctions may issue against the pornographer, only the ascertainment

of that "probable right" thought a sufficient basis for the interlocutory writ in all other contexts. This holding is said to be required by an expression of the Supreme Court in *Freedman*, refined and restated in *Southeastern*, running as follows:

> We held in *Freedman*, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt *final* judicial determination must be assured. 420 U.S., at 560, 95 S.Ct. at 1247 (emphasis added).

The context of *Freedman* and *Southeastern*, however, was very different from this. Here all action, from start to finish, was judicial; no administrator or censor figured in the matter at any stage;[2] and the only conceivable "prior restraint" would have been a preliminary injunction pendente lite. In *Freedman*, by contrast, there was involved a procedure for the absolute administrative suppression of a film by refusal of a censor's license; and in *Southeastern*, the use of a theatre was administratively refused, thus preventing entirely the production of a musical there. These were "final" administrative acts; final, that is, unless and until those complaining of them took their cases to court and bore the burden of overturning

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2. Indeed, the only action ever contemplated was a *suit* by the county attorney to obtain an injunction against the showing of obscene motion pictures. King Arts forestalled even this by bringing its own suit in federal court to restrain the county attorney from such an action.

them. In such situations, the quoted formulation by the Supreme Court makes sense and has full application: limiting the censor to a brief, administrative restraint, followed by judicial review at the instance of the censor, with the burden of proof upon him, and a required prompt, final judicial determination ending the administrative ministry one way or the other.

Nor has the Court left us in doubt about why it requires prompt and final judicial action in such a context: it is because "[d]uring the time prior to judicial determination, the [administrative] restraint altered the status quo"[3] and after administrative intervention "a judicial determination must occur 'promptly so that administrative delay does not in itself become a form of censorship.'"[4] In other words, only a brief *non*-judicial interdiction of matter arguably protected by the first amendment will be tolerated; and if material has been taken off the market by a final administrative action pending a judicial decision, that decision must come quickly. Here, however, neither reason for such a rule obtains. There neither was nor could have been any administrative restraint to alter the status quo. Nor could such a restraint (since there neither was nor could have been one) have required hurried judicial action finally upholding or reversing it, lest adminstrative delay become itself an instrument of suppression.

That these holdings have application to proceedings such as this, which contemplate neither censor nor other administrator but only the normal judicial process, is far

3. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 562, 95 S.Ct. 1239, 1248, 43 L.Ed.2d 448 (1975).

4. *Heller* v. *New York*, 413 U.S. 483, 489, 93 S.Ct. 2789, 2793, 37 L.Ed.2d 745 (1973), quoting from *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 367, 91 S.Ct. 1400, 28 L.Ed.2d 44 (1971).

from clear to me. To apply, their rule must be rewritten to run as follows: where a preliminary judicial decision resulting from an adversary hearing has been made that matter is probably obscene and should be taken off the market pendente lite, a procedural scheme—to be valid as applied to pornography—must further require that the judge conduct a prompt hearing on the merits of obscenity and render a prompt final judgment on it as well.

I do not deny that there are arguments that can be made in support of such a rule. It seems to me, however, that they are of quite a different sort than those which underlie the rule of *Freedman* and *Southeastern*: that censors (all too often, history teaches, afflicted by tunnel vision) should not be permitted to remove first-amendment type matter from the marketplace indefinitely or cast the burdens of going forward or of proof on its purveyors and that where such matter is censored, prompt and effective review by a judge must be provided so that the matter is, if protected, returned to the marketplace without any lengthy languishing under administrative ban. I hope that I am not insensitive to first amendment considerations and issues; but it seems to me that where mere successive stages of judicial consideration—usually before the same judge—are concerned rather than review by the judge of a censor's fiat, the general procedures which suffice for all other purposes should be sufficient for dealing with pornography.

Conclusion

For the above reasons, I respectfully dissent from Parts II and III of the opinion herein.

APPENDIX D

UNIVERSAL AMUSEMENT CO., INC., et al.

v.

Carol VANCE et al.

Civ. A. No. 73-H-528.

United States District Court,
S. D. Texas,
Houston Division.

July 3, 1975.

Numerous actions brought to challenge Texas statutes dealing with showing of obscene films and actions taken by state, county and city officials under other statutes against motion picture theaters were consolidated. Three cases, which presented the fewest jurisdictional problems, and which straightforwardly raised all of the constitutional questions raised by the various cases, were selected for determination and the three-judge court, Singleton, J., held that Texas statute declaring it a nuisance to use a building for commercial exhibition of obscene materials, as interpreted by Texas courts, was not vague or overly broad; but that related statutes, which permit entry of injunction against future exhibition of obscene films and requirement that bond be posted in order for theater to remain in operation with bond being forfeited in the event that an obscene motion picture was shown, imposed an impermissible prior restraint; that statute prohibiting possession of criminal instrument was not intended to apply to possession of motion picture projectors which could be used

to show obscene films; and that statute permitting issuance of search warrant to seize property which has been designed for, is adaptable for, or is commonly used in criminal activity was overly broad insofar as it permitted seizure of items such as motion picture projectors.

Order accordingly.

1. Courts (Key) 260.4

Where there was no pending criminal or civil prosecution in state courts because county attorney had determined that he would wait until three-judge federal court determined issues before pursuing his intention to seek an injunction, based on nuisance statute, against use of certain premises for showing of pornographic motion pictures, federal court was not required to abstain.

2. Declaratory Judgment (Key) 209

In view of county attorney's announced intention to seek injunction, based on nuisance statute, against use of certain premises for showing of pornographic films, action for declaratory and injunctive relief against such action presented an actual controversy even though the county attorney had determined that he would wait until the three-judge federal court determined the issues before pursuing his intention. U.S.C.A.Const.art. 3, § 1 et seq.

3. Injunction (Key) 14

Traditional prerequisite to injunctive relief is irreparable injury; this is true whether the injunction seeks to stop activities of private citizens or the activities of the state, whether criminal or civil.

4. Declaratory Judgment (Key) 124, 387

Where operator of motion picture theater was being threatened by county attorney with injunction, based on nuisance statute, and the inconveniences of prosecution would not rise to the level of irreparable injury, court would issue declaratory judgment with respect to constitutionality of use of the nuisance statute against the operator of the motion picture theater but would not issue injunction. Vernon's Ann.Tex.Civ.St. art. 4667.

5. Criminal Law (Key) 13.1(13)

In the absence of instruction by Court of Criminal Appeals, or Texas Supreme Court, sexual conduct, depiction of which is forbidden by Texas nuisance statute, is not sufficiently specific. V.T.C.A., Penal Code § 43.21; Vernon's Ann.Tex.Civ.St. art. 4667.

6. Criminal Law (Key) 13.1(13)

Texas statutes defining obscenity and making it a nuisance to use a building for commercial exhibition of obscene materials, as interpreted by Texas Court of Criminal Appeals and the Texas Court of Civil Appeals, are not impermissibly vague. V.T.C.A., Penal Code § 43.21; Vernon's Ann.Tex.Civ.St. art. 4667.

7. Declaratory Judgment (Key) 366

Where there were no pending actions under Texas statute making it a nuisance to use a building for commercial exhibition of obscene material and no criminal conviction before the court, question of constitutionality of applying state court interpretations of nuisance statute retroactively so as to preclude challenge to the statute

based on vagueness and overbreadth was not ripe for adjudication. V.T.C.A., Penal Code § 43.21; Vernon's Ann. Tex.Civ.St. art. 4667.

8. Obscenity (Key) 15

Although obscenity is not within the area of constitutionally protected speech, the censor has the burden of proving that a film is obscene. U.S.C.A.Const. Amend. 1.

9. Constitutional Law (Key) 90.1(6)

By completely shutting down, pursuant to nuisance statute, operation of a motion picture theater, or by forcing the posting of bond to keep the theater open, on the basis that the theater has previously shown obscene films, state has imposed a prior restraint upon the showing of motion pictures. U.S.C.A.Const. Amend 1; Vernon's Ann. Tex.Civ.St. arts. 4665-4667.

10. Constitutional Law (Key) 90.1(6)

Motion pictures are protected by the free speech and free press guarantees of the First Amendment. U.S.C.A. Const. Amend. 1.

11. Constitutional Law (Key) 90.1(6)

Fact that injunction against future exhibition of obscene films, which would abate nuisance arising under Texas statute from use of building for exhibition of obscene films, could be carefully drawn and could be highly descriptive of kind of films which were to be prohibited did not remove prior restraint effect of injunction against showing of such films and requirement that theater operator post a bond in order to remain in operation. U.S.C.A. Const. Amend. 1; Vernon's Ann.Tex.Civ.St. arts. 4665-4667.

12. Constitutional Law (Key) 90.1(6)

Statute which permits evidence of general reputation of a motion picture to be admissible to prove the existence of a nuisance resulting from exhibition of obscene film, thus authorizing injunction against future exhibition of obscene films, does not fit guidelines for permissible prior restraints. Vernon's Ann.Tex.Civ.St. arts. 4665-4667.

13. Courts (Key) 508(7)

Doctrine that federal courts should not interfere with pending state criminal prosecutions is not absolute; federal intervention, in the proper case, is allowed.

14. Disorderly Conduct (Key) 1

Statute prohibiting unlawful use of a criminal instrument is not a "use" statute; rather it is a statute aimed at incipient crime, possession of a criminal instrument, with a specific intent to use the instrument in the commission of a crime; the statute is not only not aimed at an instrument which has lawful uses, it is not aimed at overt criminal actions at all. V.T.C.A., Penal Code § 16.01.

15. Searches and Seizures (Key) 3.4

County's action in repeatedly seizing copies of allegedly obscene film and portable film projectors, on a theory that the latter were criminal instruments, upon viewing of the film by a magistrate was improper even though, before hearing at which magistrate would view the film was held, theater owner was informed of the time of the hearing and advised to obtain an attorney. V.T.C.A., Penal Code § 16.01.

16. Courts (Key) 508(7)

Actions of county and city officials in conducting multiple seizures of the same film, and in charging employees and manager of the theater with violation of statute prohibiting possession of criminal instruments, on the basis of their possession of motion picture projectors, which was inappropriate to the situation, constituted sufficient bad faith and harassment to permit federal court to intervene despite presence of criminal prosecutions. V.T.C.A., Penal Code § 16.01.

17. Courts (Key) 508(7)

Where felony charges had not been presented by state to the grand jury so that party who sought injunction against alleged harassment and prosecution by state officials had been prevented from defending himself in state court, abstention doctrine did not apply.

18. Disorderly Conduct (Key) 1

Statute prohibiting possession of criminal instruments did not cover motion picture theater manager's actions in possessing an ordinary portable 16 millimeter motion picture projector with removable interchangeable reels on which allegedly obscene films were shown. V.T.C.A., Penal Code § 16.01.

19. Injunction (Key) 105(1)

County and city officials which had been found to have unconstitutionally engaged in seizures of allegedly obscene motion picture films and seizure of the projectors on theory that the latter were criminal instruments because they had been used to show the allegedly obscene films and which had been shown to have had no intention of filing

charges under the possession of criminal instrument statute and to have undertaken the action in order to harass the exhibitors would be permanently enjoined from prosecuting pending felony charges based on possession of criminal instruments. V.T.C.A., Penal Code § 16.01.

20. Courts (Key) 101.5(1)

In light of the fact that declaratory judgment phase of a case is often dealt with by a three-judge court in conjunction with a prayer for injunction, it is not jurisdictionally improper for three-judge court to hear a declaratory judgment case even though request for injunction has been abandoned by the plaintiff.

21. Courts (Key) 101.5(4)

Where, in original complaint, motion picture theater sought both injunctive and declaratory relief, where theater sought injunction in addition to declaratory relief in amended complaint, and where court could not say that motion picture theater had truly abandoned any claim for injunctive relief claim for declaratory judgment was properly before three-judge court even if claim for injunctive relief had been abandoned at the last minute.

22. Declaratory Judgment (Key) 274

Fact that motion picture theater had not been charged with any crime did not require finding that no case or controversy nor substantial federal question was presented by its claim for declaratory relief with respect to utilization by city and state of police powers against the corporation by seizing and retaining property which it had been using to show allegedly obscene films Vernon's Ann.Tex.C.C.P. art. 18.02.

23. Courts (Key) 260.4

Where there was no pending criminal prosecution against motion picture theater, although it was intimated that there existed criminal prosecutions against individuals arising out of seizures of theater's equipment, federal court was not required to abstain from request for declaratory or injunctive relief with regard to the propriety of the seizures.

24. Constitutional Law (Key) 90.1(6)

Only if a motion picture is judicially judged to be obscene does it cease to be protected by the First Amendment; although the showing of a motion picture may be a crime, it is not a crime until it has been judicially determined to be so. U.S.C.A.Const. Amend. 1.

25. Searches and Seizures (Key) 3.4

Motion picture projector equipment, coin boxes, stools, and portions of booths would not be relevant evidence in trial of charge of commercial exhibition of obscene materials and seizure of such materials could not be justified on such ground. Vernon's Ann.Tex.C.C.P. art. 18.02.

26. Constitutional Law (Key) 90.1(1)
Searches and Seizures (Key) 2

Language "or commonly used in," as used in statute authorizing search warrant to be issued for seizure of property which is "specially designed, made or adapted for, or commonly used in the commission of an offense" is unconstitutionally vague and overbroad and was unconstitutional as applied to any individual or entity engaged in First Amendment activities as its use could result in seizure of equipment and materials which could be used

for exhibition of constitutionally protected items for the purpose of shutting down First Amendment activities offensive to authorities before judicial determination of obscenity. Vernon's Ann.Tex.C.C.P. art. 18.02(2).

Clyde Woody and Marian Rosen, Woody & Rosen, Houston, Tex., for Universal Amusement Co., Inc., et al.

Joseph G. Rollins, Sr. Asst. City Atty., Joe Moss, Asst. Dist. Atty., Houston, Tex., Lonnie F. Zwiener, Asst. Atty. Gen., Austin, Tex., for Carol Vance et al.

Malcolm Dade, Dallas, Tex., J. Mack Ausburn, San Antonio, Tex., Frierson M. Graves, Jr., Memphis, Tenn., for King Arts Theatre, Inc.

John L. Hill, Atty. Gen., by Max P. Flusche, Jr., Asst. Atty. Gen., Austin, Tex., for George E. McCrea et al.

Mike Aranson, Tony Kaufman, Dallas, Tex., for Ellwest Stereo Theatres, Inc.

N. Alex Bickley, City Atty., Joseph G. Werner, Asst. City Atty., Dallas, Tex., for Donald Byrd and Mel Southall.

John B. Tolle, Asst. Dist. Atty., Dallas, Tex., for Robert Cole.

John L. Hill, Atty. Gen., by Lonny F. Zwiener, Asst. Atty. Gen., Austin, Tex., for State of Texas.

J. Mack Ausburn, San Antonio, Tex., for Richard C. Dexter.

Keith W. Burris, Dist. Atty., Nelson M. Atwell, Asst. Crim. Dist. Atty., Edgar Pfeil, Jane H. Macon, San Antonio, Tex., for Ted Butler et al.

Before INGRAHAM, Circuit Judge, and SINGLETON and TAYLOR, District Judges.

SINGLETON, District Judge:

I. *Introduction*

This case comes before this three-judge court in a unique posture. The original case, *Universal Amusements v. Vance,* the captioned case, was brought in the Southern District of Texas, Houston Division, and concerned the impending trial of a motion picture theater operator who had shown the film "Deep Throat." Plaintiff in that case challenged the constitutionality of article 527 of the Texas Penal Code which at that time constituted the statutory law in Texas on obscenity. The plaintiffs sought, among other remedies, injunctive relief to enjoin the pending criminal prosecution. This three-judge court was constituted as a result of that case.

At approximately the same time as the Houston prosecutions were being instituted and carried out, a motion picture theater operator in Dallas, Texas, was being prosecuted for also showing "Deep Throat." This prosecution was under the same statute. Chief Judge John R. Brown consolidated these two "Deep Throat" cases.

In May of 1973 a hearing on a preliminary injunction was heard by a three-judge court and denied. The cases were then continued. Over the next two years, many changes in the posture of these cases occurred. The Houston state court prosecution for the showing of the motion picture "Deep Throat" was twice tried. Each time the trial ended in a mistrial because the jury was unable to agree on a verdict. More importantly, however, the prosecution for alleged obsecenity-connected activities mushroomed all over the state of Texas. Each time a defendant would seek to have his obscenity prosecution enjoined in a federal court in Texas, Chief Judge John R. Brown would consolidate such case with the instant

three-judge case. A full list of all of the cases can be found in an appendix to this opinion.

On August 12 the managing judge of this three-judge court, Honorable John V. Singleton, held a pretrial conference at which attorneys representing all of the parties in each of the cases then consolidated appeared.

The cases, as they were consolidated into the original case, presented a variety of challenges to Texas statutes. Not only was the constitutionality of the substantive obscenity statutes challenged but also the use of statutes allegedly designed for purposes other than the closing down of purported commercial obscenity was challenged, as were the old and new public nuisance statutes used to abate the alleged public nuisance of commercial obscenity. Finally, the law on obscenity had changed. In June of 1973, the Supreme Court decided the Miller quintet.[1] Shortly thereafter, two more important cases in the obscenity field were decided: *Heller* v. *New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973) and *Roaden* v. *Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973). These cases dealt not with substantive obscenity laws but with the procedures to be used to bring into court those who are alleged purveyors of obscenity. The Texas obscenity laws, too, had changed. On January 1, 1974, the old article 527 was repealed, and in its place section 43.21 et seq. of the new penal code was enacted. The Texas nuisance statutes, also, were changed to specifically provide

1. The so-called *Miller* quintet consists of five companion cases handed down on June 21, 1973: *Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed2d 419 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); *Kaplan* v. *California*, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); *United States* v. *12 200-Ft. Reels*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973); and *United States* v. *Orito*, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973).

for the enjoining of the use of a premises for purposes of commercial obscenity.

In an effort to simplify the process of deciding all of these varied cases, the managing judge chose three of the cases which presented the least jurisdictional problems and also presented straightforwardly at least one of the challenges brought on by each of the remaining cases.

On November 15, 1974, the three-judge court again convened to hear oral arguments in each of the three cases. Each of the three sets of parties had earlier submitted a joint Pretrial Order, in which material and important facts had been stipulated and briefs on the points of law involved. Two of the cases have remaining factual disputes, but these are immaterial to the determination of these cases.

II. *King Arts Theatre* v. *McCrea, CA-6-345*

The *King Arts* case comes out of San Angelo, Tom Green County, Texas. The plaintiffs are challenging the facial constitutionality of article 4667 of Vernon's Annotated Civil Statutes which provides for the abatement of public nuisances and, specifically, the inclusion, as a nuisance, of premises for purposes of commercial obscenity. The facts, as agreed to by the parties are as follows. King Arts Theatre, Inc., was operating an adults-only, enclosed motion picture theater in San Angelo, Texas. The theater showed sexually explicit films. On October 30, 1973, the landlord from whom the theater building was rented notified King Arts Theatre, Inc., that, at the suggestion of George E. McCrea, the county attorney of San Angelo, he was terminating the lease of the building as of November 15, 1973. The notice further informed

the plaintiff that McCrea had contacted the landlord and told him that he intended to bring an application for an injunction to abate the theater as a public nuisance in order to prohibit the future showing of allegedly pornographic motion pictures.

Plaintiff filed suit on November 12, 1973, requesting a declaratory judgment and injunctive relief. By agreement all parties have determined that the *status quo* will be maintained until the determination of this case.

The county attorney still intends to seek an injunction based on the nuisance statute and to pursue his intention to cancel the lease of the premises.

[1-3] The initial hurdle which has faced this court since the inception of these suits does not face us in this suit. That is the *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), hurdle. In the instant case there is no pending criminal or civil prosecution because the county attorney determined that he should wait until the three-judge court had determined the issues before pursuing his intentions. Although the parties could not confer upon the court by agreement jurisdiction where it was lacking, the actions of the county attorney in failing to actively pursue his threatened course of action would certainly lessen the court's considerations of equity, comity, and federalism upon which *Younger* is based. At the same time, however, the existence of the threat of a real prosecution under the nuisance statute is enough to present an actual controversy as required by Article III of the Constitution. *Steffel* v. *Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). One further question must be answered before we move to the merits of this case. The plaintiff moves for an injunction to prevent the state from utilizing the nuisance statute against it. A traditional prerequisite to injunctive relief, however, has been irreparable injury. This is true whether the injunction seeks to stop the activities of private citizens or the activities of the state, whether criminal or civil. *Steffel* v. *Thompson, supra,* has suggested that the question of whether or not injunctive relief can be granted in a threatened but not yet pending criminal case brought by the state may depend upon the status of the alleged criminal activity:

> We note that, in those cases where injunctive relief has been sought to restrain an imminent, but not yet pending, prosecution *for past conduct,* sufficient injury has not been found to warrant injunctive relief, see *Beal* v. *Missouri P. R. Corp.*, 312 U.S. 45, 61 S.Ct. 418, 85 L.Ed. 577 (1941); *Spielman Motor Sales Co., Inc.* v. *Dodge*, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322 (1935); *Fenner* v. *Boykin*, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927 (1926). There is some question, however, whether a showing of irreparable injury might be made in a case where, although no prosecution is pending or impending, an individual demonstrates that he will be required to *forego* constitutionally protected activity in order to avoid arrest. Compare *Dombrowski* v. *Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *Hygrade Provision Co., Inc.* v. *Sherman*, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402 (1925); and *Terrace* v. *Thompson*, 263 U.S. 197, 214, 216, 44 S.Ct. 15, 18, 68 L.Ed. 255 (1923), with *Douglas* v. *City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943) . . . .

415 U.S. at 463, n. 12, 94 S.Ct. at 1218.

[4] In the instant suit the plaintiff is being threatened with the use of a civil statute although it would be used by the district attorney, and in a real sense the

plaintiff would be "prosecuted" by the state.[2] Although it might be termed quasi-criminal in nature, the statute in question does not provide for the incidents of a true criminal statute such as arrest or the posting of a bond. The inconveniences a prosecution of the nuisance statute would bring would not rise to the level of irreparable injury, at least on the facts presented in the instant case. For that reason, the court will confine itself to the question of a declaratory judgment.

The merits of the *King Arts* case present two questions for decision because of the structure of the Texas obscenity laws themselves. As originally threatened by the county attorney of Tom Green County, the nuisance statute, article 4667 of Vernon's Annotated Civil Statutes, provided for the enjoining of "the habitual use, actual, threatened or contemplated, of any premises, place or building or part . . . [f]or keeping, being interested in, aiding or abetting the keeping of a bawdy or disorderly house, as those terms are defined in the Penal Code."

Article 513 of the old Texas Penal Code defined a "disorderly house" in section 2(a) as "any house, building, theater or other structure where obscene motion pictures are displayed, exhibited or shown to persons under twenty-one (21) years of age." Section 2(c) and 2(d) of the statute defined "obscene motion picture" and "prurient interest" in the *Roth-Memoirs*[3] language virtually identical

2. It is interesting to note that the Supreme Court has very recently held that a similar Ohio statute was more akin to a criminal prosecution than are most civil cases. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

3. *Roth* v. *United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1957), and *Memoirs* v. *Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), are two Supreme Court cases which set out tests and definitions of obscenity. Their language forms the basis of almost all state statutory law governing obscenity, including both the old and new Texas statutes. Their language has been supplanted by the *Miller* quintet.

to that of the old penal code obscenity statute, article 527. The only material difference is that article 513 adds a sentence defining "contemporary community standards." The King Arts Theatre, Inc., was originally threatened with the use of these statutes.

After January 1, 1974, both the nuisance laws and the obscenity laws of Texas were changed. Article 527, "Obscene Articles" and article 513, "Disorderly House" were repealed by the enactment of the new penal code and article 4667 of the Texas Civil Statutes was rewritten. The new article 4667, "Injunctions to abate public nuisances" provides for the enjoining of the "habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof . . . (d) [f]or the commercial manufacturing, commercial distribution, or commercial exhibition of obscene materials . . . ."

Although one is not directed to the definition of obscenity by the statute itself, the logical place to find the state's definition of obscenity would be in the new Penal Code § 43.21, which defines obscenity in virtually the same terms as the old article 527.

The plaintiffs have challenged the nuisance statute because its use necessarily refers one to the Penal Code § 43.21 definition of "obscene." This definition is challenged for the reasons that (1) the definition of obscenity is too vague and indefinite; (2) the statute as it is written or as it is construed is unconstitutional because it does not specifically define the sexual conduct prohibited, it does not give fair notice, and it is overbroad.

In a lengthy and exhaustive opinion, *West* v. *State of Texas*, Tex.Cr.App., 514 S.W.2d 433, decided October 9, 1974, the Texas Court of Criminal Appeals addressed the question of the constitutionality of the article 527 defi-

nition of obscenity. In the *West* case the appellant had been convicted in June of 1971 of exhibiting obscene matter under article 527. The conviction was affirmed in 1972. 489 S.W.2d 597 (Tex.Cr.App. 1972). A writ of certiorari was granted by the United States Supreme Court, the judgment of the Texas Court of Criminal Appeals was vacated, and the case was remanded for further consideration by the Court of Criminal Appeals, in light of the Supreme Court's *Miller* quintet on October 23, 1973. *West* v. *Texas,* 414 U.S. 961, 94 S.Ct. 268, 38 L.Ed.2d 209. On February 13, 1974, the Court of Criminal Appeals again affirmed the conviction, but the court granted appellant's motion for leave to file a motion for rehearing. In the opinion denying appellant's motion for rehearing the Court of Criminal Appeals held that although article 527 was perhaps deficient on its face, it had been authoritatively construed by the courts of Texas, and these previous authoritative constructions of the statute supplied any constitutional deficiencies. *West* v. *State,* 514 S.W.2d 433 (Tex. Cr.App. 1974).

Article 527's definition of obscenity has been reenacted, effective January 1, 1974, in § 43.21 of the new Texas Penal Code. The "Practice Commentary" of the Code points out that the language "sex, nudity, or excretion" replaces the old term "sexual matters" in article 527's definition of "obscene." Section 43.21 reads:

> Definitions.
>
> In this subchapter:
>
> (1) "Obscene" means having as a whole a dominant theme that:
>
> (A) appeals to a prurient interest in sex, nudity, or excretion;

> (B) is patently offensive because it affronts contemporary community standards relating to the description or representation of sex, nudity, or excretion; and
>
> (C) is utterly without redeeming social value.
>
> (2) "Material" means a book, magazine, newspaper, or other printed or written material; a picture, drawing, photograph, motion picture, or other pictorial representation; a statue or other figure; a recording, transcription, or mechanical, chemical, or electrical reproduction; or other article, equipment, or machine.
>
> (3) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion that goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.
>
> (4) "Distribute" means to transfer possession, whether with or without consideration.
>
> (5) "Commercially distribute" means to transfer possession for valuable consideration.

The *West* opinion deals with a gloss on the "sexual matters" term, but this court believes that the Court of Criminal Appeals would apply that gloss to the substituted terms, "sex, nudity, or excretion."

Both article 527 and section 43.21 have taken their language from the definition found in *Memoirs* v. *Massachusetts,* 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), and *Roth* v. *United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). This definition differs from the

new *Miller* definition in two ways. First, under *Miller* the state does not need to prove that the matter is utterly without redeeming social value. Proof of such a negative was felt by the Supreme Court to be a virtual impossibility and an unnecessary hindrance to the state's prosecutorial functions. In place of the "utterly without redeeming social value" postulate, the Supreme Court substituted the requirement that the state prove the matter lacking in "serious literary, artistic, political, or scientific value."

In the second place, the Supreme Court changed the standard to require the state's obscenity laws clearly and specifically to define what is meant by obscene matters:

> We now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.

413 U.S. at 24, 93 S.Ct. at 2614. Further on in the opinion the Court indicates that these specific definitions are to be of "hard core" pornography only. 413 U.S. at 27, 93 S.Ct. 2607.

Footnote 6 of the *Miller* opinion, 413 U.S. at 24, 93 S.Ct. at 2615, clearly indicates that the new *Miller* standard for obscenity is not intended to require the states except Oregon and Hawaii, whose definitions of specific sexual conduct are given as examples by the Court, to enact new obscenity laws. "Other existing state statutes, as construed heretofore or hereafter, may well be adequate."

[5] This court must answer the question of whether or not the Texas statute can pass the *Miller* test on this issue. Whether referred to as "sexual matters," the term which concerned the Court of Criminal Appeals, or "sex,

nudity, or excretion," which concerns this court, the defined sexual conduct, the depiction of which is forbidden by the Texas statutes, old or new, is not sufficiently specific on its face to satisfy *Miller*. However, the construction of the statute by the Court of Criminal Appeals may well save the statute. The Court of Criminal Appeals so held in the *West* case.

In the *West* opinion, the Court of Criminal Appeals interpreted and restricted the term "sexual matters" used in the article 527 § 1 definition of obscenity to the examples the Supreme Court used in *Miller*:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

413 U.S. at 25, 93 S.Ct. at 2615.

Further, the Court of Criminal Appeals cited five cases handed down prior to the *Miller* case in which either the Court of Criminal Appeals or the Court of Civil Appeals had construed the statute as forbidding conduct which would fit into the examples which the Supreme Court gave.[4]

[6] The cases show that the courts of Texas have adhered rather closely to the ideas of the Supreme Court of what constitutes obscenity. Although it seems to this court that the obscenity laws, even the most specific, are

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4. *Phelper* v. *State*, 396 S.W.2d 396 (Tex.Cr.App.1965), *Moore* v. *State*, 470 S.W.2d 391 (Tex.Civ.App.—San Antonio 1971), writ ref'd n. r. e., *Bryers* v. *State*, 480 S.W.2d 712 (Tex.Cr.App. 1972), *Hunt* v. *State*, 475 S.W.2d 935 (Tex.Cr.App.1972), and *Thacker* v. *State*, 490 S.W.2d 854 (Tex.Cr.App.1973).

by their natures vague,[5] we cannot hold in light of the *Miller* quintet's guidelines that the Texas statute, as construed, is impermissibly so.

In *Hamling* v. *United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), one of the more recent Supreme Court cases on the obscenity subject, the Court faced a challenge to the federal obscenity statute, 18 U.S.C. § 1461, which had repeatedly been held not unconstitutionally vague. The statute was again challenged on the grounds that now the statute was unconstitutionally vague because its language did not contain, nor had it been construed to apply, to the specific types of conduct set out in *Miller*. The Court held that that argument "fundamentally misconceives the thrust of our decision in the *Miller* cases." The Court reiterated that the purpose of the *Miller* quintet was not to invalidate all existing statutes. "The *Miller* cases . . . were intended neither as legislative drafting handbooks or as manuals of jury instructions." Since in *United States* v. *12 200-foot Reels of Film*, 413 U.S. 123, 93 S.Ct. 2665 (1973), one of the *Miller* cases, the Court had clearly indicated that the federal statute would in the future be construed as dealing only with obscenity such as that described in *Miller* and since it was also clear that the material found obscene in *Hamling* was well within the *Miller* limits, the Supreme Court found that 18 U.S.C. § 1461, on its face, as construed, or as applied to appellant Hamling was not void for vagueness.

A related argument in *Hamling* that the statute did not give appellant fair warning of the crime, in light of the new *Miller* standards, failed because the Court pointed out that *Miller* presented a "clarifying gloss" to

5. *Cf.* discussion in *Roth* v. *United States*, 354 U.S. 476, 491-492, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

a statute. It did not make criminal, conduct which was not previously thought to be criminal.

The plaintiff has not presented any other specific challenges to the vagueness and overbreadth of section 43.21 (formerly article 527), although he has challenged the statute generally for this reason. The statute tracks the language of the *Memoirs-Roth* cases as we have seen, and although *Miller* may have served to clarify that language to a greater extent, *Hamling* makes clear that *Miller* was never intended to invalidate that language completely. Of the two changes which *Miller* made on the *Memoirs-Roth* language, one would render the Texas statute now more stringent than is constitutionally necessary, and the other has now been authoritatively and definitely included in the statutory language through judicial construction by the highest criminal court in the state.

It is clear to this court, therefore, that as it would be incorporated by reference into the nuisance statute scheme, the Texas Penal Code definition of obscenity is not unconstitutionally vague, overbroad, or invalid because it fails to give adequate notice.

[7] The plaintiffs have urged us to hold that the Texas definition as now construed by the Court of Criminal Appeals cannot be used retroactively since the defendants would not have a clear notice of the new construction. The Court of Criminal Appeals rejected that argument in *West* v. *State*, but the Supreme Court in *Hamling* was not called upon to give a definite ruling since the conduct in *Hamling* so clearly fell within the *Miller* "examples." The posture of the instant case, in which there are no pending cases to say nothing of a criminal conviction is such that this court, as much as it would prefer to dispose of all issues at one time, believes that it would be highly improper to rule on a point which is not yet ripe for adjudication.

In considering the plaintiff's second challenge to the public nuisance statute, article 4667, we must also consider its companion statutes, articles 4665 and 4666.

Article 4665, "Nuisance; evidence" provides:

> Proof that any of said prohibited acts are frequently committed in any of said places shall be prima facie evidence that the proprietor knowingly permitted the same, and evidence that persons have been convicted of committing any said act in a hotel, boarding house or rooming house, is admissible to show knowledge on the part of the defendants that this law is being violated in the house. The original papers and judgments or certified copies thereof in such cases of convictions may be used in evidence in the suit for injunction and oral evidence is admissible to show that the offense for which said parties were convicted was committed in said house. Evidence of general reputation of said houses shall also be admissible to prove the existence of said nuisance.

Article 4666, "Nuisance; prosecution," was not changed by the legislature when these other statutes were redrawn. It is the only nuisance statute which can be used in the obscenity field because article 527 § 1 was repealed with the enactment of the new penal code. The statute provides that upon "reliable information" that a nuisance exists, the attorney general, the district attorney, or the county attorney shall bring suit in the name of the state to abate and enjoin the nuisance. If the state wins, the nuisance is abated and the defendants enjoined from maintaining it. The premises are to be closed for one year unless "the owner, tenant, or lessee" makes bond "in the penal sum of not less than $1,000 nor more than $5,000," with the condition that "the acts prohibited in this law shall not be done or permitted to be done in said house."

The plaintiffs have challenged the use of these Texas nuisance statutes against the operation of allegedly obscene motion picture theaters or bookstores because the statutes present a classic example of a prior restraint and because the procedural safeguards are inadequate to protect the dissemination of nonobscene materials which might be caught up with the obscene. Since nonobscene expression is entitled to first amendment protection, the threat which these statutes may present to the first amendment is of serious consideration.

The plaintiffs do not contend that the state cannot enjoin the showing of motion pictures which have been adjudicated obscene. Rather, the argument is that the statute is unconstitutional in providing that once a theater is declared a nuisance, it is to be shut down for one year unless a bond is posted. This prevents the showing of motion pictures that have not been determined obscene.

[8-10] Although it is now clear that "obscenity is not within the area of constitutionally protected speech or press," *Roth* v. *United States*, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957), it is equally as clear that the censor has the burden of proving that a film is obscene. *Freedman* v. *Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 95 S.Ct. 1239, (1975). To prove that a motion picture theater has been the scene of the showing of films that are obscene is not to prove that every film shown in that theater, in the past, present, or future, was, is, or will be obscene. By completely shutting down the operation of a motion picture theater, or by forcing the posting of a bond to keep the theater open, the state has imposed a prior restraint upon the showing of motion pictures. Motion pictures are protected by the free speech and free press guarantees of the first amendment, *Interstate Circuit*,

Inc. v. *Dallas*, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968) although they are not "necessarily subject to the precise rules governing any other particular method of expression." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098, 1106 (1952). That this statute is clearly a prior restraint upon the showing of motion pictures cannot be disputed. *Cf. Near* v. *Minnesota*, 238 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1930). ". . . [U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrant*, 367 U.S. 717, 731, 81 S.Ct. 1708, 1716, 6 L.Ed.2d 1127 (1961). Since "[a]ny system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity," *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.E.2d 1 (1971), a statute which would impose such a prior restraint is to be "tolerated . . . only where it operate[s] under judicial superintendence and assure[s] an almost immediate judicial determination of the validity of the restraint." *Bantam Books*, 372 U.S. at 70, 83 S.Ct. at 639. The statute in question, by providing for the closing down of the theater or posting bond has not provided for a judicial determination of the obscenity of future motion pictures which may be shown in the theater.

In its defense the state has tried to distinguish the instant case from *Near* v. *Minnesota, supra*, but the attempt is not successful. In both cases the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain." *Bantam Books*

v. *Sullivan*, 372 U.S. at 66, 83 S.Ct. 631. The separation of these forms of speech calls for "sensitive tools," *Speiser* v. *Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958), not the heavy hand of the public nuisance statute.

[11] The state defends the statute by its assertion that the injunction which would abate the nuisance can be carefully drawn and highly descriptive of the kinds of films which are to be prohibited, citing the Texas Court of Civil Appeals case, *Richards* v. *State*, 497 S.W.2d 770 (Tex.Civ. App.—Beaumont, 1973), which dealt with an injunction outside the scope of article 4667. In that case the Texas court recognized that the injunction imposed a prior restraint, but upheld it because of "the specificity of the prohibiting order, the course of conduct of the defendants, and the fact that such forbidden future exhibitions would be of hard core pornography." With all respect to the Court of Civil Appeals sitting in Beaumont, this court disagrees with that court's disposition of the case.

In disagreeing with the Court of Civil Appeals, we fall back on the reasoning of *Near* v. *Minnesota*, 283 U.S. at 713, 51 S.Ct. at 630 (1930):

> If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship.

In the instant case if we cut through the details of procedure the substance of the statute is that the public authorities may bring the owner or operator of a motion picture theater before a judge upon a charge of commercially manufacturing, distributing, or exhibiting obscene material. Once the state has proved that he has manufactured, distributed, or exhibited obscene materials, his theater is abated for one year unless he posts a bond of from $1,000 to $5,000. Unless the bond is posted, further showing of any motion picture is punishable by contempt of court. If the bond is posted then motion pictures may be shown, but should at any time the owner or operator step over that fine line between obscenity and nonobscenity, then the bond is forfeited. To this court, that is the essence of censorship.

As dissenting Justice Butler points out in *Near*, the newspapers which the Minnesota statute affected in *Near* were not ordinary newspapers criticizing the actions of public officials. These newspapers were engaged in harsh and malicious diatribes often employing racial ephitets and highly improbable statements. Justice Butler was concerned that the "distribution of scandalous matter is detrimental to public morals and to the general welfare." 283 U.S. at 728, 51 S.Ct. at 635. His dissent, if paraphrased, could make a logical and telling argument for the defense of the nuisance statute in the instant case. Yet, the majority of the Supreme Court held the first amendment more important.

In *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 445, 77 S.Ct. 1325, 1330, 1 L.Ed.2d 1469 (1957), the Supreme Court explained its *Near* decision as striking down the state's attempt to "enjoin the dissemination of future issues of a publication because its past issues had been found offensive." This alone, the Court stated, was enough to condemn the

statute, without any reference to the fact that *Near* involved not obscenity, but matters derogatory to public officials, *i.e.*, politics.

In neither the *Near* case nor the instant case does the state seek to condemn that which is wholesome or deserving of protection, yet the flaw of both statutes is that in preventing the dissemination of the unwholesome it prevents the dissemination of that which is presumed to be legal and protected by the first amendment without a prior judicial determination of illegality.

Times Film Corp. v. *Chicago*, 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961) held that prior restraints are not per se unconstitutional, however, and the *Near* case itself left open to the state the possibility of presenting "exceptional circumstances" the showing of which would permit a valid prior restraint of first amendment activities. Among the several examples of situations in which previous restraint of speech may be allowable is: "the primary requirements of decency may be enforced against obscene publications." *Near* v. *Minnesota*, 283 U.S. at 716, 51 S.Ct. at 631.

Near does not suggest, however, that even within these exceptional cases there might not be room for invalid restraints, and *Freedman* v. *Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), made this clear when it set forth guidelines for permissible prior restraints:

> First, the burden of proving that the film is unprotected expression must rest on the censor. . . .
>
> Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend

> an effect of finality to the censor's determination whether a film constitutes protected expression. . . . [O]nly a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. . . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. . . . [T]he procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

380 U.S. at 58-59, 85 S.Ct. at 739. The language of *Freedman* has been reemphasized in *Southeastern Promotions, Ltd.*, 420 U.S. at 559, 95 S.Ct. at 1247.

Freedman was specifically concerned with the licensing requirement imposed upon film exhibitors. Although the instant case imposes a reverse situation, we have found that it operates, in effect, as a censoring-licensing statute. The *Freedman* language thus gives a great deal of guidance to our decision in the instant case. The key to the *Freedman* case seems to be initial suppression for the shortest fixed period of time until a judicial determination is made and then final suppression *only* after a judicial determination in an adversary context.

By instituting the injunction procedure for a public nuisance, however, the State of Texas is not interested in preserving the *status quo*. The injunction seeks to change the situation by preventing the dissemination of obscenity, but it does not provide for a short fixed time in which a final determination of obscenity can be made.

With this in mind we turn to the procedural framework in which the public nuisance statute operates. The specific requirements of obtaining an injunction in Texas, which would presumably be utilized in actions pursuant to article 4667, leave much to be desired if they are used in the obscenity context. Rules 680-693a of the Texas Rules of Civil Procedure provide the injunction procedures for Texas. Pursuant to those rules, the state could obtain a temporary restraining order lasting up to ten days, ex parte. As soon as possible, within that ten days, however, a hearing on a temporary injunction is obtainable. The temporary injunction is not a final adjudication on the merits but, once it is obtained, there is no provision for treating the case any differently from any other civil case. The lack of a provision for a swift final adjudication on the obscenity question raises serious doubts of the constitutional usability of the injunction process in Texas for an obscenity situation.

[12] Article 4665 provides that evidence of "general reputation" is also admissible to prove the existence of the nuisance. The rather vague term leaves in constitutional doubt the means by which the prosecution would prove the obscenity alleged. Certainly it leaves open the strong possibility that a constitutional definition of obscenity would not be used. Articles 4666 and 4667 do not even provide by their terms any judicial determination of obscenity prior to the issuance of the injunction. Thus, it is seen that the Texas public nuisance statute does not even begin to fit into the guidelines for permissible prior restraints.

Article 4667(a)(3) of Vernon's Annotated Civil Statutes operates as an invalid prior restraint on the first amendment rights of those who commercially manufacture, distribute, or exhibit materials which may be thought by the state to be oscene but which have not yet been judicially determined to be obscene. For that reason this court hereby declares that article 4667(a)(3) of Vernon's Annotated Civil Statutes is unconstitutional on its face.

III. *Richard Dexter* v. *Ted Butler, SA 74-CA-168*

The facts of this case are very simple. On four successive occasions—June 24, 1974, June 28, 1974, July 2, 1974, and July 6, 1974—an officer of the San Antonio, Texas, police force entered the Fiesta Theatre, paid the $5 admission charge, and viewed the film "Deep Throat." After viewing the film, he wrote out a report and signed a "Motion for Adversary Hearing" to determine whether or not there was probable cause to seize the film for violating the Texas obscenity laws. The motion was presented to a magistrate who ordered the cause set for a hearing. The plaintiff, who was either merely an employee of the Fiesta Theatre or was its lessee and manager, it matters not to the decision in this case, was notified of the hearing and was advised to call his attorney. Within a half hour to an hour, on each occasion, the hearing was begun. The plaintiff, after consulting with his attorney, waived counsel at the hearing. The hearing was conducted in an unwavering pattern. First, the officer who had viewed the film was called to the stand to testify as to the contents of the film, then the film was viewed by the magistrate. After the viewing of the film, the magistrate issued a search warrant to seize the film and to seize the projector as a "criminal instrument" pursuant to § 16.01 of the Texas Penal Code. On the first three

occasions, the plaintiff was then arrested, either alone or in company with another theater employee, and charged with "use of a criminal instrument," and "commercial obscenity" in violation of § 43.23 of the Texas Penal Code. On the fourth occasion, theater employee Wayne Walker alone was arrested and charged with those offenses. Some $55,000 worth of bonds was set on the plaintiff.

After each seizure the theater obtained another copy of the same motion picture, "Deep Throat," and another projector. The theater continued to operate as usual, except when the film was seized and it was necessary to secure another film and another projector.

The charge of commercial obscenity, § 43.23 Texas Penal Code, is a class B misdemeanor. Section 12.22 of the Texas Penal Code provides for a fine not to exceed $1,000, confinement not to exceed 180 days, or both. The misdemeanor charges were set for trial in County Court No. 3, Bexar County, Texas, and it is the court's understanding that they have been tried. The plaintiff has no quarrel in this court with the charges against him brought pursuant to §43.23. He is challenging, however, the use against him of § 16.01—the criminal instruments statute. That statute provides that it is a class 3 felony and § 12.34 provides for confinement of not more than ten years nor less than two years and a fine not to exceed $5,000. None of the felony charges of violation of § 16.01 on the plaintiff has been presented to the grand jury for indictment, but felony complaints have been filed in each instance and the cases are "pending" in that sense.

The defendants have based their entire defense upon their contention that this court lacks the jurisdiction to hear the merits of the case because of the *Younger* v.

Harris doctrine. Defendant has presented no arguments to support the constitutionality of § 16.01 or its application.

[13] The *Younger* v. *Harris* doctrine[6] must give us pause since charges have been filed against the plaintiffs for violation of § 16.01. The criminal cases could be said to be "pending" although the charges have never been presented to the grand jury. What definitely constitutes a pending case has yet to be determined, but even if we unwaveringly held that the cases are "pending," that does not end our discussion. The *Younger* doctrine is not an absolute. Federal intervention, in the proper case, is allowed. The plaintiff asserts that this is the proper case. The defendant maintains that the plaintiff has failed to plead or prove any bad faith harassment or irreparable injury, the absolute prerequisite for a circumvention of *Younger* v. *Harris*. Yet, plaintiff has shown that the defendant, in the latter part of June, 1974, instituted a program of repeated seizures of the film, "Deep Throat," and the projector which showed it, charging theater personnel with not only commercial obscenity, but with felony use of a criminal instrument and then failing to present the felony cases to a grand jury. The second seizure of the identical film was not preceded by a judicial determination of the obscenity of the film "Deep Throat." It is obvious that the city of San Antonio was engaged in an "all out" effort to suppress this film. The fourth

6. In 1971 the Supreme Court of the United States decided six cases on the same day which stand for the general proposition that based on consideration of federalism, equity, and comity, federal courts should refrain from enjoining or in any way interfering with pending state court criminal prosecutions, except in very limited circumstances. *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), *Samuels* v. *Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), *Boyle* v. *Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971). *Perez* v. *Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971), *Byrne* v. *Karalexis*, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971), and *Dyson* v. *Stein*, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971).

seizure was the last only because this case was filed in federal court and further seizures were enjoined. In order to fully comprehend the innovative tactics San Antonio put into practice, it is necessary to look at the language of § 16.01 of the new Texas Penal Code:

> Unlawful use of Criminal Instrument.
>
> (a) A person commits an offense if:
>
> (1) he possesses a criminal instrument with intent to use it in the commission of an offense; or
>
> (2) with knowledge of its character and with intent to use or aid or permit another to use in the commission of an offense, he manufactures, adapts, sells, installs, or sets up a criminal instrument.
>
> (b) For purposes of this section, "criminal instrument" means anything that is specially designed, made, or adapted for the commission of an offense.
>
> (c) An offense under this section is a felony of the third degree.

The words of subpart (b) of the statute clearly indicate that a criminal instrument is not equipment which is designed, made, or adapted for a lawful use, but which incidentally may be used for the commission of a crime. There are many, many common, ordinary, everyday objects which can be used to commit crimes, but these are not criminal instruments. If the clear language of the statute is not sufficient to guide law enforcement officers, the "Practice Commentary" which immediately follows the statute has been provided by the drafters of § 16.01. Although the "Practice Commentary" does not have the force of law, it does give us as much information as legislative history because, having been written by authorities in the field, it is intended for the practitioner who utilizes the newly

enacted statute to give him a better idea of the statute's meaning. The "Practice Commentary" for section 16.01 says:

> It [the statute] aims at terminating incipient criminal activity, the existence of which is indicated by conduct involving a "criminal instrument." The mere possession or manufacture of things specially designed for the purpose of accomplishing a criminal objective is strong evidence of criminal intent. The instrument must be *specially* designed, made, or adapted for the commission of an offense, however; things frequently used in crime, but which have common, lawful uses, are excluded from the purview of Section 16.01 because possession of such things, alone, is conduct too ambiguous for imposition of the criminal sanction. . . .

[14] From this commentary and from the clear language of the statute itself, it can be seen that the statute is not a "use" statute at all. Rather, it is a statute aimed at incipient crime—possession of a criminal instrument, with the specific intent to use the instrument in the commission of a crime. Not only is it not aimed at an instrument which has lawful uses, but it is not aimed at overt criminal actions at all.

[15] Charging the plaintiff with a § 16.01 violation with whatever motive the district attorney now would claim cannot have been undertaken with any design to actually convict the plaintiff of the crime. The articles which plaintiff possessed are stipulated to be ordinary 16 millimeter portable film projectors. Such a blatant use of an inappropriate statute, which bootstrapped the misdemeanor offense into a felony was effective in requiring that bail for a felony offense be set, not once but several times. The authorities could not believe, however, that Dexter would ultimately be convicted.

Furthermore, San Antonio has engaged in a program of multiple seizures of the same motion picture without any adjudication of obscenity following the first seizures. In the pretrial order the defendant lists as one of its contentions that *Heller* v. *New York* "does not proscribe subsequent arrests and seizures for separate and distinct offenses committed by the same person on separate occasions prior to which complete adversary hearings were conducted by a neutral magistrate." It is hard for the court to see how the district attorney of Bexar County could possibly read *Heller* v. *New York* in this way. The district attorney puts much emphasis on the "adversary hearing" aspect of this case, but we need not unduly concern ourselves with that aspect. The magistrate in *Heller* viewed the film in the theater, just as the magistrate in this case. In such a situation an "adversary" hearing is not required at all—the film itself is sufficient to establish "probable obscenity" to subject the film to seizure. The fact that the magistrate notified the attorney and gave him the opportunity to appear at a "hearing"—which consisted of nothing more than the testimony of the police officer and the viewing of the film does not transform San Antonio's procedures into an adversary hearing, the results of which would have the force and effect of a final adjudication of obscenity. We assume that San Antonio is asking us to hold that their procedures are something more than an inquiry into the probable obscenity of the film. This court will not so hold. Bexar County might be commended in other circumstances for its even-handedness in notifying the defense attorney and allowing him to participate in the proceedings, but its actions would not change the function of the hearing which was to determine "probable obscenity."

Heller held that when the magistrate issuing the warrant actually views the entire film, an adversary hearing

prior to the seizure of the film is unnecessary because he has a full opportunity for an independent judicial consideration of probable obscenity. It is implicit in the *Heller* opinion, however, that the decision depended upon the fact that after its seizure:

> [O]f course, the film was not subjected to any form of "final restraint," in the sense of being enjoined from exhibition or threatened with destruction. A copy of the film was temporarily detained in order to *preserve it as evidence.* There has been no showing that the seizure of a copy of the film precluded its continued exhibition. Nor, in this case, did temporary restraint in itself "become a form of censorship," even making the doubtful assumption that no other copies of the film existed. (No emphasis added.)

413 U.S. at 490, 93 S.Ct. at 2793. Any way one reads this language, one must come to the conclusion that *Heller* implicitly forbids multiple seizures of the type in which Bexar County engaged.

The import of the *Heller* case was recently analyzed in Judge Taylor's recent opinion, *Bradford* v. *Wade,* 376 F.Supp. 45, 47 (N.D.Tex.1974):

> [A]t what point can the local authorities seize other copies of the same film that has already been seized? The Supreme Court in *Heller* reaffirmed the proposition that a valid final restraint can only be imposed upon a judicial determination in a full adversary proceeding. The only purpose of seizing a film is for use as evidence. No further copies can be seized until the film is determined to be obscene by a judicial determination on the merits. The Court even said that if the exhibitor does not have another copy of the film, he is to be allowed to copy it for further showing. To not do so, would allow the administrative procedure to become a form of prior censorship.

There is no evidentiary reason why this film should have been seized more than one time. When viewed objectively there is no logical reason why this film was seized four times except that the authorities were attempting to harass the theater and its employees and to eliminate the exhibition of this film—prior to any final judicial determination of its obscenity. It is no answer that the authorities were unsuccessful at their chosen task. Resourcefulness in the face of official harassment should not inure to the benefit of the official harassers.

In a companion case to *Younger* v. *Harris, supra, Perez* v. *Ledesma,* 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971), the Court expressed the exception to its general holding that long standing equitable and comity principles prevent a federal court from interfering with a pending state court criminal prosecution whether by injunction or by declaratory judgment:

> Only in cases of proven harassment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate.

401 U.S. at 85, 91 S.Ct. at 677.

[16] The actions of the Bexar County and San Antonio city officials, in the first place, in conducting multiple seizures of the same film, and in the second place, of charging the plaintiff with violation of a statute which is manifestly inappropriate to the situation, together constitute sufficient bad faith harassment and special circum-

stances to take the case out of *Younger* v. *Harris, supra,* and this court finds that plaintiff has proven harassment *and* prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction. The Fifth Circuit said in *Shaw* v. *Garrison,* 467 F.2d 113 (5th Cir. 1972):

> We hold as the language of *Younger* makes clear, that a showing of bad faith or harassment is equivalent to a showing of irreparable injury for purposes of the comity restraints defined in *Younger,* because there is a federal right to be free from bad faith prosecutions. Irreparable injury need not be independently established.
>
> * * *
>
> The finding of a bad faith prosecution establishes irreparable injury both great and immediate for purposes of the comity restraints discussed in *Younger.*

467 F.2d at 120.

The most important rationale for the holding in *Younger* v. *Harris, supra,* is the belief of the Justices that "defense against a single criminal prosecution" in a state court will in most instances be sufficient to protect any defendant's federal constitutional rights. There is a further serious question in this court's mind of whether or not the plaintiff in this case would be afforded the opportunity to defend himself. He is subject to three felony charges but these had not been brought to the grand jury at the time of the hearing before the three-judge court—a space of some five months. When asked about the status of the felony cases, the district attorney asserted that his office was under the impression that the temporary restraining order issued by the managing

judge prohibited the presentation to the grand jury. The temporary restraining order read, however:

> [D]efendants . . . be and they are hereby restrained and enjoined from further seizures of versions of the film "Deep Throat" at the Fiesta Theatre, San Antonio, Texas and from arresting the plaintiff, or employees of said theatre, so long as "Deep Throat" is showing at the Fiesta Theatre, San Antonio, Texas . . . .

This temporary restraining order was first issued July 29, 1974, and was successively extended over the continuing protest of the defendant. It was superseded by an order entered September 6, 1974, which enjoined, until the three-judge court could meet and decide, "all proceedings and activities with regard to the Plaintiffs in the consolidated cases." Clearly, however, the order excluded from its purview "pending state criminal prosecutions" and left the state "free to bring to trial and try any such cases." Neither of those orders entered by the managing judge was intended to, nor does a clear reading of them lead to the conclusion that they, prevent the state from presenting a case to the grand jury.

[17] This court believes that a further reason for the inapplicability of the *Younger* decision in this case is the fact that the state failed to present these charges to the grand jury and through no fault of the plaintiff has prevented him from defending himself in a state court.

[18] The merits of this case are easily disposed of. The statute, § 16.01 of the Texas Penal Code, is clearly drawn and very specific. Fault lies not with the legislature in this instance but with the local authorities who brought charges under this law. The statute was obviously designed to deal with a very small class of property which can be used only for the commission of crime and to

deal with persons in possession of such property or engaged in the manufacture or adaptation of the property exclusively for use in criminal activities, before the criminal activities are undertaken or completed. By no stretch of the imagination could this statute be used to cover the plaintiff's actions or the possession of an ordinary portable 16 millimeter motion picture projector with removable interchangeable reels.

[19] The court declares that it was applied by the Bexar County and San Antonio city authorities unconstitutionally to the plaintiff motion picture exhibitor. Accordingly, having also found the requisite irreparable harm, the court enjoins the state from prosecuting plaintiff Dexter on the pending felony charges pursuant to § 16.01 of the Texas Penal Code, arising from incidents on June 24, June 28, and July 2, 1974, and in future from prosecuting any motion picture exhibitor for possession or use of equipment which can be used for any lawful purpose.

IV. *Ellwest Stereo Theatre, Inc.* v. *Donald Byrd, et al., CA-3-74-130-E.*

The plaintiff in this case operates the Ellwest Stereo Theatre in Dallas, Texas. The theater operates what is referred to in slang terms as a "peep show." A number of viewing booths, said to resemble voting booths, each with its own stool and its own projector are provided for patrons who put coins in a coin slot in order to begin the operation of the projector. A short motion picture may then be viewed. On January 24, 1974, a police officer of the city of Dallas entered the theater armed with a search warrant issued by a justice of the peace pursuant to § 18.02(2) of the Texas Code of Criminal Procedure. The officer seized three films and three film projectors. With the aid of tools, three coin boxes with their contents

were removed. On January 29, 1974, the police officer again entered the premises of the Ellwest Stereo Theatre with a search warrant issued by a justice of the peace and seized two films, two film projectors and two stools. Walls which formed two viewing booths were also removed with the aid of tools.

The parties stipulated that the projectors, coin boxes, booths, and stools seized by the police on January 27, and 29, 1974, belong to the Ellwest Stereo Theatre, Inc., and that Ellwest Stereo Theatre, Inc., has never been prosecuted for a violation of the Texas obscenity laws, articles 43.22, 43.23, or 43.24 of the Texas Penal Code. This is true despite the fact that property seized has been in police custody since its seizure.

Before approaching the merits of the case, we must decide the jurisdictional questions raised by defendant at oral argument. Defendant contends that since apparently plaintiff has abandoned its claim for injunctive relief, this court has no jurisdiction to hear its remaining claim for declaratory relief.

The court has found only one case in which it is stated that there is no jurisdiction in the three-judge court to hear a declaratory judgment action alone. *Long Island Vietnam Moratorium Committee* v. *Cahn*, 322 F.Supp. 559 (E.D.N.Y.1970) said in a case in which the plaintiff had represented to the court that no present need for equitable relief existed in view of the fact that the defendant district attorney had agreed to hold off his threatened prosecution until the three-judge court had acted:

> [W]e do not consider the representations of the parties to amount to a withdrawal of a request for injunctive relief, without which, of course, this three-judge court would have no jurisdiction.

322 F.Supp. at 561.

[20] The district court cites two Supreme Court cases, *Swift & Co.* v. *Wickham*, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965), and *Flemming* v. *Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 14 L.Ed.2d 1435 (1960). While not inappropriate to the subject matter, these cases are not strong authority for the conclusion reached by the New York court. The *Swift* case concerns the applicability of the three-judge court statute, title 28, section 2281, to a case in which a state statute is challenged on the grounds that it interfered with the supremacy clause of the United States Constitution. Having concluded that the statute was not meant to deal with such questions, the appeal was dismissed for want of jurisdiction. In light of the fact that the declaratory judgment phase of a case is often dealt with by a three-judge court in conjunction with a plea for an injunction, it is not jurisdictionally improper for a three-judge court to hear a declaratory judgment case. In the *Flemming* case the constitutionality of a federal statute was "drawn into question," in a suit seeking the reversal of the decision of the Secretary of Health, Education and Welfare pursuant to the social security laws. The case decided that when the constitutionality of a statute is drawn into question, but no injunction is sought, a three-judge court is inappropriate.

In the case to which defendant has cited us, *Triple A Realty, Inc.* v. *Florida Real Estate Commission*, 468 F.2d 245 (5th Cir. 1972), a single district judge had entered a declaratory judgment that a Florida statute was unconstitutional. The district judge went further to enjoin the state from using this statute. The state appealed on the grounds that a single judge had no authority to issue an injunction and the Fifth Circuit agreed. The court held:

> It is well settled that a three judge panel is required to enjoin state officers from enforcing a state statute. There are several exceptions, however, and the three-judge statute has long been regarded as a highly technical rule which is to be construed strictly. One well-recognized exception is that actions for declaratory judgments, despite some similarity in result with actions for injunctions, are sufficiently different to fall outside the three-judge requirement. *Mitchell* v. *Donovan*, 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

The case does not hold, therefore, that it is jurisdictionally impossible for a three-judge court to hear a declaratory judgment. The *Mitchell* v. *Donovan* case cited by the Fifth Circuit in the quotation above concerns 28 U.S.C. § 1253, which provides for direct appeal to the Supreme Court of cases in which a three-judge court has granted or denied an injunction. The Supreme Court held that the losing party *could not* directly appeal to the Supreme Court a three-judge court's decision which did nothing more than issue a declaratory judgment. The case was not concerned with whether or not a three-judge court *could* issue a declaratory judgment alone or under what circumstances. In *Kennedy* v. *Mendoza-Martinez*, the plaintiff amended his declaratory judgment complaint to include a prayer for injunctive relief just before the beginning of the third trial in the case. However, the issues were framed for trial to exclude any injunctive relief, and the single district judge who heard the case never mentioned it in his memorandum opinion, findings of fact and conclusions of law, or his judgment. A declaratory judgment only was granted. The Supreme Court concluded that since no injunctive relief was really at issue, there was no reason to convene a three-judge court, and the single judge's decision could stand. The Court continued:

> Whether an action solely for declaratory relief would under all circumstances be inappropriate for consideration by a three-judge court we need not now decide, for it is clear that in the present case the congressional policy underlying the statute was not frustrated by trial before a single judge.

372 U.S. at 154, 83 S.Ct. at 560.

[21] It would appear to this court that that question is still open and that this court is free to decide the issue, taking into consideration all of the circumstances surrounding the suit. In his original complaint filed February 13, 1974, plaintiff sought both injunctive and declaratory relief. On May 1, 1974, Judge Brown consolidated the case into the already existing block of cases for purposes of deciding the constitutionality of the obscenity statute. As late as September 4, 1974, wher. the complaint was amended, plaintiff was still seeking an injunction in addition to declaratory relief. Although the pretrial order does not seek injunctive relief, plaintiff's brief addresses itself fully to the question and all but invites the court to grant injunctive relief. Although plaintiff has not presented the point very precisely, the court cannot say that he has truly abandoned any claim for injunctive relief. Nor can we say that even if he did so abandon his claim at the eleventh hour it would be jurisdictionally inappropriate to hear the case given the circumstances. We therefore hold that plaintiff's claim for a declaratory judgment is properly before this three-judge court and will proceed to the second jurisdictional challenge.

[22] Defendant has alleged that there is no case or controversy here, nor a substantial federal question presented because the plaintiff corporation has not been charged with any crime. The court believes that this

fact is irrelevant to the determination of the question of case or controversy. The City of Dallas and the State of Texas have utilized their police powers against the corporation by seizing and retaining its property pursuant to a search warrant issued under article 18.02 of the Texas Code of Criminal Procedure. This presents a case or controversy, *i. e.*, a live grievance. *Goosby* v. *Osser*, 409 U.S. 512, 93 S.Ct. 854, 35 L.Ed.2d 36 (1972). Inasmuch as the plaintiff is engaged in the dissemination of motion pictures, presumptively protected by the first amendment to the United States Constitution, and the actions of the state have served to curtail that activity to some extent, the plaintiff has presented to the court a *question* which has substantial first and fourteenth amendment overtones worthy of consideration. Whether or not plaintiff's claim is meritorious, however, remains to be seen.

[23] *Younger* v. *Harris* does not appear to be an issue in the instant case. It was not raised in the pretrial order, in the briefs, or at oral argument. There are no pending criminal prosecutions, at least against the plaintiff here. It has been intimated that there exist criminal prosecutions against individuals arising out of these seizures, but the court is completely unaware of the identity of the individuals involved or of exactly how or even if the property seized was used in prosecutions directed against them. In the recent case *Steffel* v. *Thompson*, 415 U.S. 452, 471, 94 S.Ct. 1209, 1221, 39 L.Ed.2d 505 (1974), the Supreme Court states in footnote 19: "The pending prosecution of petitioner's handbilling companion does not affect petitioner's action for declaratory relief." The footnote continues with a reference to *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), in which the pending prosecution of a doctor under the Texan abortion laws did not foreclose a declaratory judgment in favor of a pregnant woman against whom no prosecution was

pending. Finding no jurisdictional, equitable, comity, or federal bar to the maintenance of this suit, the court will proceed to the merits.

Article 18.02(2) of the Code of Criminal Procedure of Texas as amended effective January 1, 1974, reads:

> [A] search warrant may be issued to search for and seize . . . (2) property specially designed, made, or adapted for or commonly used in the commission of an offense.

Plaintiff has asserted that article 18.02(2) is void on its face and as it applied to plaintiff for three reasons: (1) it places and enforces a prior restraint on material presumptively protected by the first amendment; (2) it is vague and overbroad; and (3) it fails to provide fair notice to persons affected by the statute of the items it proscribes.

As we have pointed out in our discussion of the *King Arts Theatre* case, the question of what is and what is not a permissible "prior restraint" is an involved one. Calling the use of article 18.02(2) a "defacto prior restraint" is, to this court, a confusion of the issues. In essence, the plaintiff is complaining that under the guise of searching for and seizing as evidence property which "is specially designed, made or adapted for or commonly used in the commission of a crime," the state can, to some extent at least, "shut down" the operations of an adult motion picture business.

The State argues that assuming that the motion pictures shown by the plaintiff corporation were obscene and knowing as we do that Texas has laws to prevent the commercial showing of obscenity, we are left with the indisputable fact that the equipment seized is equipment "commonly used in the commission of a crime."

[24] In order to accept the state's argument, however, we must assume that the motion pictures shown were indeed obscene. This we cannot assume. Motion pictures are protected by the first amendment. Only if they are judicially judged to be *obscene*, using the guidelines set forth by the Supreme Court, do they cease to be protected by the first amendment. While it is true that the showing of a motion picture can be a crime, it is not a crime until it has been judicially determined to be so. This fact takes motion picture obscenity cases out of the realm of crimes such as gambling. A gambler may have a business and he may utilize gambling machines and instruments to carry on his business. The police, using article 18.02(2), may come in with a search warrant and seize all of his equipment, effectively shutting down his business. Such a case would not disturb a court for one reason: the gambler does not have any protections which fall outside the due process requirements of a state's criminal laws. The adult motion picture proprietor, however, no matter how lewd his neighbors and the police and the district attorney's office may think his business to be, has an added protection—the protection of the first amendment. Until the items which he shows are each proved obscene, he can show anything he wants to show. The police cannot shut down or attempt to shut down his business. *Cf. Marcus* v. *Property Search Warrants*, 367 U.S. 717, 730-731, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961).

[25] The state claims, however, that all it was attempting to do was to gather evidence for the trial of obscenity cases and the instruments used in the business were evidence of the crime. Certainly, projection equipment, coin boxes, stools, and portions of booths would not be relevant evidence in the trial of a case alleging commercial exhibition of obscene materials. Proof of the obscenity would seem to rise or fall with the material

exhibited, not with equipment used to exhibit the materials. The Dallas city attorney asserted at the oral argument that the booth walls were seized as evidence of pandering. Once again we can only guess at the way in which pandering could be proved by the physical presence of the booth in the courtroom, as distinguished from a photograph of the wall or a lab report of any substances found upon the booth itself. The explanation of the seizure of the booth walls does not explain why or how the projecting equipment, the stools, and the coin boxes are evidentiary and none was offered.

In a case which does not involve the first amendment, this court might accept the "evidence" argument advanced by the City. It is too tenuous, however, when placed in the light of the first amendment. The law enforcement officers entered the theater not once but twice. Each time they seized not only the film shown but also the coin box and projector attached to each booth. Whether intentional or not, and we need not make such a finding here, their actions served to curtail the operation of the business. It is true that the theater has not been put out of business, but this appears to be the result of the "informal agreement," entered into by the parties before Judge Mahon, not to pursue the matter until this three-judge court had made its decision.

The state cites to us *Heller* v. *New York, supra,* asking us to hold that motion picture projection equipment is to be held to the same standards as the motion picture itself:

> [I]t appears consistent with the rationale of *Heller* to permit a seizure of projection equipment provided (1) such equipment is seized for a bona fide evidentiary purpose and not to suppress exhibitions of films and (2) seizure of equipment is made under the same procedural limitations applicable to film seizures under *Heller.*

Defendant's Brief, p. 5. The City in this instance has demonstrated an admirable understanding of the *Heller* case but has failed to show this court that there is any bona fide evidentiary purpose for the equipment seized here. Furthermore, all of the stipulated facts point to something far removed from a valid evidentiary search. This was a "raid," accompanied by crowbars and screwdrivers. *Heller* also stands for the proposition that these businesses were not to be shut down but were, on the contrary, to be allowed to continue with a minimum of disruption until obscenity had been proved. The officials in the instant case seem to have sought the maximum amount of disruption of the business.

The fact that the officials in the instant case abused the use of article 18.02(2), however, does not necessarily render that statute facially unconstitutional. The statute is worded to take care of several situations, but it should be precise enough to guide officials acting in good faith. Examining the entire language of article 18.02 leads one to the conclusion that the words "commonly used in the commission of an offense" are superfluous and ambiguous. It is obvious that article 18.02(2) was written as a companion to section 16.01 of the new penal code which we dealt with above in the *Dexter* case. Section 16.01 refers only to property specially designed, made, or adapted for the commission of an offense, making its possession, manufacture, adaptation, sale, installation, or setting up with knowledge and intent a criminal offense. Article 18.02 provides for a search warrant for "property specially designed, made or adapted for *or* commonly used in the commission of an offense." Section 16.01, Practice Commentary, informs us that the statute was intended to catch

the crime before it is committed. It excludes the "commonly used" or similar language because it would be too ambiguous for criminal culpability.

Since obtaining a search warrant deals only indirectly with criminal culpability, one assumes the legislature felt safe in keeping the "commonly used" language in the statute for use in ambiguous or close cases. After all, in the ordinary situation the statute providing for the issuance of a search warrant need not be too specific as long as the search warrant itself is specific. No doubt the legislature failed to foresee that the imprecision of the statute would result in the situation we face here. The language in this situation has become a carte blanche for the authorities who can issue search warrants for items, the possession or manufacture of which cannot, under section 16.01 be crimes, since as we have determined in our treatment of *Dexter* v. *Butler*, above, section 16.01 is intended for only a very limited and specific class of property. The effect is more than incidental to the motion picture exhibitor who is presumptively protected by the first amendment.

What disturbs this court is the fact that as the statute is worded, there is no bona fide evidentiary purpose which the "commonly used" language could serve. In the first amendment area, even as the state argues, precision is essential. Although in most cases it is assumed that bona fide evidentiary purposes are the basis of searches and seizures, as is evident in this case, seizures in the first amendment area may not be for evidence at all. Article 18.02(2) as it is written is wide open to such abuses. It fails to guide the police officer swearing out the warrant or the magistrate issuing the warrant who later reviews the search and seizure under articles 18.09, 18.12, and 18.13. In the instant case the evidentiary value of the

items seized (except the motion pictures themselves) is *de minimis* at best, but the threat to the first amendment rights of the theater owner is very great.

Would the striking out of the "commonly used" language create a gap, however, in the valid enforcement of other criminal laws? The subsections of amended article 18.02(1) through (9) provide for every possible contingency in which a search warrant could be needed:

> Art. 18.02 Grounds for issuance
>
> A search warrant may be issued to search for and seize:
>
> (1) property acquired by theft or in any other manner which makes its acquisition a penal offense;
>
> (2) property specially designed, made, or adapted for or commonly used in the commission of an offense;
>
> (3) arms and munitions kept or prepared for the purpose of insurrection or riot;
>
> (4) weapons prohibited by the Penal Code;
>
> (5) gambling devices or equipment, altered gambling equipment, or gambling paraphernalia;
>
> (6) obscene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law;
>
> (7) drugs kept, prepared, or manufactured in violation of the laws of this state;
>
> (8) any property the possession of which is prohibited by law;
>
> (9) implements or instruments used in the commission of a crime.

The "commonly used" language of subsection (2) is completely unnecessary not only because there is no corresponding crime for which the property could be used to establish the offense but also because the magistrate does not have to be convinced to a certainty that the property sought is "specially designed, made, or adapted for the commission of an offense," he simply must determine whether or not there is probable cause to believe the property fits the category. When the property is received by the magistrate pursuant to article 18.09, article 18.12, and article 18.13, he can make a better determination.

[26] Accordingly, this court declares that the language of article 18.02(2), "or commonly used in," is unconstitutionally vague and overbroad, is unconstitutional as applied to Ellwest Stereo Theatres, Inc., or any other individual or entity engaged in first amendment activities, in that its use can result in the seizure of equipment and materials which can be used for the exhibition of constitutionally protected items, not for the purpose of obtaining evidence, but for the purpose of shutting down first amendment activities offensive to the authorities before a judicial determination of obscenity.

V. *Conclusion*

This three-judge court, having ruled on the merits of the three cases, directs counsel for plaintiffs in each of the three cases to prepare a form of judgment in each of these three cases consistent with this opinion and to do so within thirty (30) days of the date hereof and submit same to counsel for the defendants for approval as to form and then submit same to this three-judge court for approval and entry.

The remainder of the cases, found in the Appendix to this order, will be remanded to the single judge from whom they came. Each judge will hold a hearing on the question of bad-faith harassment or other special circumstances to determine if the case falls outside *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), or *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975). Should the single judge determine that there is no bad-faith harassment or special circumstances, the cases will be dismissed by that judge in accordance with *Hunt* v. *Rodriguez*, 5 Cir., 462 F.2d 659, *rehearing granted in part*, 468 F.2d 615 (5th Cir. 1972).

Should the single district judge find bad-faith harassment or special circumstances, this three-judge court will receive the cases back and dispose of them in accordance with this opinion.

APPENDIX

Cases pending before the three-judge court styled *Universal Amusements* v. *Vance*, C.A. 73-H-528:

Universal Amusements v. *Carol Vance*, C.A. 73-H-528 S/D

Jones v. *Dyson*, C.A. 3-7024-C N/D

Assocated Theatres v. *Dyson*, C.A. 3-7398-C N/D

Associated Theatres v. *Wade*, C.A. 3-7347-C N/D

Hargrove v. *Hill*, C.A. 73-H-1114 S/D

Southland Theatres v. *Butler*, SA-73-CA-214 W/D

San Antonio Bookmart v. *Smith*, A-74-CA-078 W/D

Ellwest Theatres v. *Walls*, CA-4-74-45 N/D

Cinema X v. *Curry & Walls*, CA-4-74-28 N/D

Sun Family Entertainment v. *Hanna*, B-74-142-CA E/D

Wells v. *Miles*, A-74-CA-189 W/D

Cook v. *Peters*, SA-74-CA-176 W/D

Carson v. *Baily*, CA-7-74-65 N/D

Claybrook v. *Baily*, CA-7-74-83 N/D

Lovely v. *Driver*, CA-7-74-45 N/D

McKenzie v. *Butler*, SA-74-CA-315 W/D

German v. *Simpson*, A-75-CA-34 W/D

Dismissed by this Order:

King Arts v. *McCrea*, CA-6-345 N/D

Dexter v. *Butler*, SA-74-CA-168 W/D

Ellwest v. *Byrd*, CA-3-74-130-E N/D

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-4313

UNIVERSAL AMUSEMENT COMPANY, INC., ET AL.,

versus

CAROL VANCE, ET AL.,

RICHARD C. DEXTER,
Plaintiff-Appellee,

versus

TED BUTLER, District Attorney of
Bexar County, Texas, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(Filed January 19, 1979)

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.*

*Judges Thornberry and Morgan were members of the en banc court under 28 USCA 46 (c) and participated in the oral argument of the case en banc. Subsequently, the Omnibus Judgeship Bill, Public Law 95-486 (95th Congress) was approved October 20, 1978. In view of this, Judges Thornberry and Morgan do not participate in this decision.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by Ted Butler and Emil Peters in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ (Illegible)
United States Circuit Judge

APPENDIX F

425 U.S. 262, 47 L.Ed.2d 774

Ted BUTLER and Emil Peters

v.

Richard C. DEXTER.

No. 75-623.

April 19, 1976.

Appeal was taken from an order of a three-judge district court empaneled in the United States District Court for the Southern District of Texas, 404 F.Supp. 33, enjoining law enforcement authorities from prosecuting individuals on the felony charge that their motion picture projector was a "criminal instrument" as defined by the Texas Penal Code. The United States Supreme Court held that it was without jurisdiction to consider the appeal since no substantial question concerning the constitutionality of the Texas statute was presented to the district court.

Vacated and remanded.

1. Appeal and Error (Key) 23

United States Supreme Court must take notice on its own motion where jurisdiction does not appear.

2. Courts (Key) 385(1)

United States Supreme Court had no jurisdiction to entertain appeal from order of three-judge district court enjoining Texas authorities from prosecuting individuals on

felony charge that their motion picture projector was "criminal instrument" within meaning of Texas Penal Code where no substantial question concerning constitutionality of statute was presented to district court, and injunction was granted instead on ground that local officials had acted unconstitutionally in using statute on pretext for arrest and setting of felony bonds when they knew that statute was inapplicable and that no conviction could ever be obtained. V.T.C.A., Penal Code §§ 12.22, 12.34, 16.01, 43.23; 28 U.S.C.A. §§ 1253, 2281.

PER CURIAM.

[1] This is an appeal under 28 U.S.C. § 1253 from an order of a three-judge District Court enjoining the appellants from prosecuting the appellee on the felony charge that his motion picture projector is a "criminal instrument" under § 16.01 of the Texas Penal Code.[1] Since no substantial question about the constitutionality of § 16.01 has been raised, we dismiss the appeal for want of jurisdiction in this Court.[2]

---

1. Texas Penal Code Ann. § 16.01 (1974):

"Unlawful Use of Criminal Instrument

"(a) A person commits an offense if:

"(1) he possesses a criminal instrument with intent to use it in the commission of an offense; or

"(2) with knowledge of its character and with intent to use or aid or permit another to use in the commission of an offense, he manufactures, adapts, sells, installs, or sets up a criminal instrument.

"(b) For purposes of this section, 'criminal instrument' means anything that is specially designed, made, or adapted for the commission of an offense.

"(c) An offense under this section is a felony of the third degree."

2. Although the appellee has not moved to dismiss the appeal, this Court must take notice on its own motion where jurisdiction does not appear. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306, 82 S.Ct. 1502, 1513, 8 L.Ed.2d 510, 524 (1962).

The facts of this case are relatively simple. The appellee, Richard Dexter, ran the Fiesta Theatre in San Antonio, Tex., which in June and July 1974 was exhibiting the film "Deep Throat." On three[3] separate occasions, an officer of the San Antonio police force paid for admission, entered the theater, and viewed the film. The officer, on each occasion, then wrote out a "Motion for Adversary Hearing" to determine whether there was probable cause to seize the film for violating the Texas obscenity laws. Each time, a magistrate held a short "hearing" in the lobby of the theater, at which he heard the testimony of the police officer, then viewed the film. Each time, the magistrate then issued a warrant to seize the film *and* to seia "criminal instrument" under § 16.01 of the Texas Penal Code. Appellee was then arrested and charged with "commercial obscenity" in violation of Texas Penal Code, § 43.23, and "use of a criminal instrument'" in violation of § 16.01. The charge of commercial obscenity is a Class B misdemeanor, carrying a fine not to exceed $1,000, confinement not to exceed 180 days, or both.[4] Appellee did not, according to the trial court, pursue any complaint about these charges in the federal court. He was brought to trial on these charges in the state courts and they are not in issue here. His challenge, rather, was against the prosecutor's charging him with violations of the criminal instruments statute for his possession of ordinary 16-mm. movie projectors. Violation of that statute is a third-degree felony, and carries a penalty of from 2 to 10 years' confinement and a fine not to exceed $5,000.[5] Although the felony complaints were lodged and appellee was forced

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3. There was another occasion where substantially the same events occurred, but appellee was not arrested, although a theater employee named William Walker was.

4. Tex. Penal Code Ann., § 12.22 (1974).

5. Tex. Penal Code Ann. § 12.34 (1974).

to post some $31,000 in bonds, these charges were never presented to the grand jury.[6]

A "criminal instrument," for purposes of the Texas statute, is anything "specially designed, made, or adapted for the commission of an offense."[7] From an examination of the "clear language of the statute" and from an examination of the unofficial "practice commentary" to the statute, the District Court concluded that "[b]y no stretch of the imagination could this statute be used to cover the plaintiff's actions or the possession of an ordinary portable 16 millimeter motion picture projector with removable interchangeable reels."[8]

From its conclusion as to the obvious inapplicability of the statute, and from the prosecutor's failure to present the charges to the grand jury, the District Court found that "[c]harging the plaintiff with a § 16.01 violation . . . cannot have been undertaken with any design to actually convict the plaintiff of the crime. . . . Such a blatant use of an inappropriate statute, which bootstrapped the misdemeanor offense into a felony was effective in requiring that bail for a felony offense be set, not once but several times. The authorities could not believe, however, that Dexter would ultimately be convicted."[9]

---

6. Appellants argued below that the District Attorney believed he was precluded from pursuing those charges by the restraining order issued by the federal court. However, the restraining order specifically provided that "no pending State criminal prosecutions are enjoined and the State is free to bring to trial and try any such cases." The District Judge also informed the appellants on at least two occasions during the hearings that the restraining order did bar the bringing of indictments on any pending charges.

7. See n. 1, *supra*.

8. *Universal Amusement Co.* v. *Vance*, 404 F.Supp. 33, 48, 51 (S.D.Tex.1975).

9. *Id.* at 48.

Appellants present several contentions regarding the jurisdiction of the District Court and the correctness of its decision. We do not reach these questions, however, as we have concluded that we have no jurisdiction to consider this case on direct appeal. Jurisdiction is predicated on 28 U.S.C. § 1253, granting the right of direct appeal from an order "granting [an] . . . injunction in any civil action . . . required by any Act of Congress to be heard and determined by a district court of three judges." Title 28 U.S.C. § 2281 provides that "[a]n . . . injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . shall not be granted . . . upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges . . . ." Under this statute a three-judge court is required if "a complaint seeks to enjoin a state statute on substantial grounds of federal unconstitutionality, . . . even though nonconstitutional grounds of attack are also alleged . . . ." *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 85, 80 S.Ct. 568, 575, 4 L.Ed.2d 568, 576 (1960). However, in this case the District Court ruled that the actions of the appellants were not taken in the enforcement of the statute and thus no serious question about the constitutionality of the statue was presented.

[2] As noted above, the District Court found that the felony "criminal instruments" charges were made in bad faith and without any design actually to convict appellee on those charges. Rather, the felony charges were made as part of a pattern of harassment by the San Antonio police designed to force appellee to stop exhibiting "Deep

Throat." But the arrests and the charges were not made in any attempt to enforce § 16.01.[10] Nor was the injunction granted on the ground that § 16.01 was unconstitutional; rather, it was granted on the ground that the local officials had acted unconstitutionally in using that statute as a pretext for arrest and the setting of felony bonds when they knew that the statute was inapplicable and that no conviction could ever be obtained. Since no substantial question concerning the constitutionality of § 16.01 was presented to the District Court, a three-judge court was not required.[11] Cf. *Bailey* v. *Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962).

A somewhat better argument might be made that the prosecutor's actions were part of an effort to enforce the commercial obscenity statute, albeit in a somewhat irregular manner. However, it could not be contended that the District Court grounded its injunction in any way on the unconstitutionality of the commercial obscenity stat-

10. Cf. *Phillips* v. *United States*, 312 U.S. 246, 252, 61 S.Ct. 480, 484, 85 L.Ed.2d 800, 805 (1941): "But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority. . . . It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law." The situation is, of course, to be distinguished from an attack on a statute said to be unconstitutional "as applied." See also *Ex parte Bransford*, 310 U.S. 354, 60 S.Ct. 947, 84 L.Ed. 1249 (1940).

11. We have no occasion to consider whether the District Court was correct in deciding that § 16.01 did not—and that appellants knew it did not—authorize appellants' actions. Nor do we consider whether, having so decided, the court was empowered to grant appellee relief enjoining the State from prosecuting him on the pending felony charges purportedly filed pursuant to that section. We hold only that by having made that decision, the court removed from the case any possibility that the statute might be enjoined on the grounds of its unconstitutionality.

ute; the constitutionality of that statute was not even considered in this case.[12]

Since a three-judge court was not required in this case, the appeal should have been taken to the Court of Appeals for the Fifth Circuit. Since the time for appeal may have passed, we vacate the judgment and remand to the District Court so that it may enter a fresh decree from which a timely appeal can, if desired, be taken. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 95 S.Ct. 289, 42 L.Ed.2d 249 (1974); *Moody* v. *Flowers*, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967).

It is so ordered.

12. This case was consolidated in the District Court with several other cases, at least some of which did bring into question the constitutionality of a state statute. Each case before this Court, however, must be considered separately to determine whether or not this Court has jurisdiction to consider its merits.

APPENDIX G-1

NO. 0-541

IN THE 73RD
DISTRICT COURT
BEXAR COUNTY, TEXAS

EX PARTE
RICHARD DEXTER

APPLICATION FOR A WRIT OF HABEAS CORPUS

(Filed July 3, 1974)

NOW COMES Richard Dexter, hereinafter called Petitioner appearing by the undersigned attorney, and respectfully shows the Court that he is being illegally held and deprived of his liberty by W. B. "Bill" Hauck, Sheriff of Bexar County, Texas and George W. Bichsel, Chief of Police of the City of San Antonio, Texas, at the City-County Jail in the City of San Antonio, Bexar County, Texas.

WHEREFORE, Petitioner prays that a writ of Habeas Corpus issue INSTANTER ordering and directing the said W. B. "Bill" Hauck and George W. Bichsel, Sheriff and Chief of Police, as aforesaid, to produce the body of Petitioner before this Court INSTANTER, or at a time and place to be designated by this Court, then and there to show cause, if any exists, why the Petitioner should not be released from custody; or, in the alternative, why he should not be released on bail.

/s/ Marvin Miller

/s/ J. Mack Ausburn
Attorney for the Petitioner

STATE OF TEXAS)
)
COUNTY OF BEXAR)

I, J. Mack Ausburn, Marvin Miller, attorney at law, state under oath that I am the attorney for Richard Dexter Petitioner in the foregoing petition and I fully understand the same and am cognizant of the facts alleged in said petition and know the contents thereof and state that the allegations of such petition are true and correct to the best of my knowledge and belief.

/s/ Marvin Miller

/s/ J. Mark Ausburn
Attorney

SWORN TO AND SUBSCRIBED BEFORE ME, on this 3rd day of July, 1974.

/s/ (Illegible)
Notary Public
Bexar County, Texas

APPENDIX G-2

No. 0-541

IN THE 73RD
DISTRICT COURT
BEXAR COUNTY, TEXAS

EX PARTE
RICHARD DEXTER

ORDER GRANTING WRIT OF HABEAS CORPUS

On this 3 day of July, 1974, came on to be heard the motion of Richard Dexter for a writ of habeas corpus, and it appearing to the Court that the Petitioner is presently confined in the City-County Jail of San Antonio and Bexar County, Texas and it further appearing that no formal charges have been filed against the applicant and no complaint has been filed in any Court having jurisdiction of the offense indicated on the booking records at said jail, the Court finds that said applicant is entitled to a hearing on said motion for a writ of HABEAS CORPUS:

It is therefore ORDERED that W. B. "Bill" Hauck, Sheriff of Bexar County, and/or George W. Bichsel, Chief of Police of San Antonio, have and produce the person of Richard Dexter before me in the Courtroom of the 73rd District Court, on the 26th day of July, 1974, at 9 O'clock A.M., then and there to show cause why said Applicant should not be released from custody.

It is further ORDERED that Richard Dexter applicant be, and he is hereby ORDERED RELEASED from custody pending said hearing on this motion for a writ of Habeas

Corpus, conditioned, however, that the Applicant first make a bond in the amount of $1,000.00, conditioned that Applicant will well and truly make his personal appearance in the courtroom of said Court on the 26 day of July, 1974, at 9 O'clock A.M. in the Bexar County Courthouse, San Antonio, Texas for said hearing on said motion.

IT IS FURTHER ORDERED that upon being presented with an appearance bond approved by this Court, the Sheriff, Chief of Police, or any officer, person or (illegible) the City-County Jail of San Antonio and Bexar County, Texas shall immediately release Richard Dexter from custody.

SIGNED this 3 day of July, 1974.

/s/ James C. Onion
Judge of the 73rd District Court
of Bexar County, Texas

APPENDIX G-3

NO. 0-541

IN THE 73RD JUDICIAL
DISTRICT COURT OF
BEXAR COUNTY, TEXAS

EX PARTE
RICHARD C. DEXTER

AFFIDAVIT OF DISTRICT JUDGE JAMES C. ONION

I do hereby state under oath that I am the Presiding District Judge of the 73rd Judicial District Court and as such it is within my jurisdiction to hear and rule on applications for writ of habeas corpus.

On July 3, 1974, Attorney J. Mack Ausburn, representing Richard C. Dexter, filed an Application for Writ of Habeas Corpus in my Court, alleging that Richard C. Dexter had been arrested and was being held illegally on charges arising out of the Texas Obscenity Laws and the Texas Criminal Instruments Statute. Mr. Ausburn requested a hearing on the matter. Upon receipt of the Application, I granted the Writ, released Dexter on a $1,000.00 bond and set a hearing on the Writ for July 26, 1974, at 9:00 A.M.

No hearing was ever conducted, however, because neither Dexter nor his attorney ever made an appearance for the hearing.

I swear that the above is true and correct.

/s/ James C. Onion
James C. Onion, Presiding Judge
73rd Judicial District Court
Bexar County, Texas

THE STATE OF TEXAS)
)
COUNTY OF BEXAR)

On this 12 day of January, A.D. 1978, personally appeared James C. Onion, known to me to be the Presiding Judge of the 73rd Judicial District Court, who before me swore and subscribed to the truth of the foregoing instrument.

Given under my hand and seal of office on this 12th day of January, A.D. 1978.

/s/ (Illegible)
Notary Public in/for Bexar
County, Texas

My Commission expires the 30th day of April, 1979.